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IN THE

Supreme Court of the United States

JAMES WRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Arizona v. Youngblood*, 488 U.S. 51 (1988), this Court held that evidence lost or destroyed by the government constitutes a violation of the Due Process Clause requiring the suppression of evidence or dismissal of the indictment if a criminal defendant demonstrates, among other things, "bad faith" on the part of the government. The lower courts have divided over whether they may sanction the government for the spoliation of evidence in criminal cases absent the showing of bad faith required for a denial of due process. Thus, the question presented is: Did the Fourth Circuit err in holding that the government's failure to preserve evidence recognized as "key" by the government agent responsible for its preservation was insufficient to warrant a sanction absent a showing of "bad faith"?

2. In *Sorrells v. United States*, 287 U.S. 435 (1932), this Court recognized the entrapment defense, the elements of which are government inducement of the crime and the defendant's lack of predisposition to commit it. To present an entrapment defense to a jury, a defendant must show a modicum of evidence that the government induced him to commit the crime. Circuit courts are split on the evidentiary predicate necessary to satisfy this burden. Thus, the second question presented is: Did the Fourth Circuit err in holding that Mr. Wright did not show sufficient evidence of inducement when the government agent, to overcome Mr. Wright's reservations, offered Mr. Wright money and sex with women in exchange for completing the deal; played on Mr. Wright's sympathy, stating that he needed money for his daughter's mother and invoking his "love" for Mr. Wright; and coached Mr. Wright on how to broker the deal?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Wright respectfully petitions for a writ of certiorari to review the judgment of United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is not reported. (App. 1a.)

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2009. (App. 1a.) A petition for rehearing *en banc* was denied on June 2, 2009. (App. 12a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The vesting clause of Article III, Section 1 states that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

The Fifth Amendment's Due Process Clause provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case presents two important and recurring federal questions.

The first is whether the federal courts have the authority to sanction the government for breaching its duty to preserve evidence in criminal cases where bad faith, a requirement for a violation of the Due Process Clause, is not alleged. The Fourth Circuit held that although the government lost evidence that the police officer responsible for its preservation described as "key," discovery sanctions were unavailable absent a showing of bad faith. (App. 10a-11a.) The Court's decision to require bad faith before sanctioning

the government for violating non-constitutional duties to preserve evidence clashes with the purpose of the bad-faith requirement, as explained by this Court in *Arizona v. Youngblood*, 488 U.S. 51 (1988), which was to limit and confine discovery sanctions for violations arising out of the broad mandate of the Due Process Clause (rather than the more specific obligations imposed by statute and the Federal Rules of Criminal Procedure) to a narrow class of conduct. The Fourth Circuit's opinion also conflicts with the decisions of the Fifth, Eighth, and Ninth Circuits, which have sanctioned the government for the loss of discoverable evidence without requiring a showing of bad faith. By importing a requirement for a constitutional violation into a matter where the defendant sought a lesser sanction for conduct that violated the government's non-constitutional duties to preserve and make available to the defense particular types of evidence, the Fourth Circuit substantially raised the standard that criminal defendants must satisfy to obtain sanctions (*cf. United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979) (*en banc*) (Kennedy, J., concurring) (absent a constitutional violation, court considering discovery sanction in a criminal case must strike a balance "between the quality of the Government's conduct and the degree of prejudice to the accused" and should consider "the degree of *negligence* or bad faith involved" (emphasis added)), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008)), and placed criminal defendants in a worse position than similarly-situated civil litigants, who are often not required to show bad faith to justify imposition of sanctions.

The second question regards the preliminary showing a defendant must make to present an entrapment defense to a

jury. This issue has confused and divided the lower courts since this Court's decision to recognize the entrapment defense almost eighty years ago in *Sorrells v. United States*, 287 U.S. 435 (1932). In the decision below, the Fourth Circuit held that Mr. Wright was not entitled to present his entrapment defense to the jury because the government agent's persistent badgering—which included offering Mr. Wright money in exchange for completing the transaction, offering Mr. Wright sex with women for brokering the deal, playing on Mr. Wright's sympathy by stating that he needed money for his daughter's mother and by invoking his "love" for Mr. Wright, coaching Mr. Wright on how to broker the transaction, and ensuring Mr. Wright that his plans to complete the transaction were failsafe—was insufficient to permit Mr. Wright to present an entrapment defense to a jury.[1] The Fourth Circuit's decision conflicts with decisions by this Court and several circuit courts, which hold that similar, and even less severe, conduct is sufficient to permit a defendant to present an entrapment defense to the jury. The Fourth Circuit's departure from the standards articulated by this Court and other federal appellate courts in entrapment cases was particularly unwarranted here because the "key"

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[1] In dicta, the Fourth Circuit also stated, "Defendant's claim that he was entitled to present an entrapment defense to the jury also fails because defendant did not request a jury instruction on entrapment." (App. 6a.) At trial, after hearing Mr. Wright's motion for judgment of acquittal, the district court observed that Mr. Wright's counsel had not included an entrapment instruction among the proposed instructions typically submitted before trial, denied Mr. Wright's motion, and then affirmatively barred Mr. Wright from presenting an entrapment defense to the jury. Counsel acknowledged that he would abide by the court's ruling on Mr. Wright's entrapment defense and expressly preserved Mr. Wright's objections for review on appeal. (App. 376a-379a.)

evidence lost by the police was an audio recording of the government agent's initial contact with Mr. Wright and thus went to the heart of his entrapment defense. (App. 159a-161a.)

Review of both questions is warranted to resolve the conflicting holdings and to decide important questions of federal law frequently arising in the federal courts.

1. This case arises from an undercover sting operation that culminated in the arrest of James Wright on charges of possession with intent to distribute fifty or more grams of cocaine base (more commonly referred to as "crack cocaine"), in violation of 21 U.S.C. § 841, and conspiracy to possess with intent to distribute the same, in violation of 21 U.S.C. § 846. (App. 489a-490a.) The district court had jurisdiction over this case pursuant to 18 U.S.C. § 3231.

At trial, Mr. Wright's counsel demonstrated that because the police failed to follow established evidence-control procedures, the officers who oversaw the sting operation lost the audiotape of the government agent's initial telephone conversation with Mr. Wright. (App. 159a-161a.) Relying on the government's loss of that audiotape and record evidence showing that the government agent tried to induce Mr. Wright to broker the narcotics sale, Mr. Wright moved at the close of the government's case for judgment of acquittal based on entrapment. (App. 372a-379a.) The district court denied Mr. Wright's motion and ruled that Mr. Wright would be prohibited from presenting an entrapment defense to the jury. (*Id.*) Mr. Wright later asked the district court to instruct the jury that it could draw an adverse inference against the government based on the loss of the audio recording. (App. 391a-393a.) The district court concluded that Mr. Wright was unable to demonstrate that the police

acted in bad faith and denied Mr. Wright's request on that basis. (App. 393a.)

On September 14, 2005, the jury returned a guilty verdict on both counts of the indictment. The district court entered a judgment of conviction and sentenced Mr. Wright to the minimum mandatory prison term of twenty years on May 4, 2006. (App. 13a-24a.) On May 8, 2006, Mr. Wright timely appealed his conviction. The Fourth Circuit had jurisdiction over the appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. On April 28, 2009, the Fourth Circuit affirmed the conviction. Mr. Wright respectfully petitions this Court for review.

2. This case arises out of an undercover operation conducted by a U.S. Drug Enforcement Administration ("DEA") task force on September 14, 2004. That afternoon, at the request of members of the DEA task force, Jeffrey Saffell placed a telephone call to Mr. Wright. (App. 239a.) When he placed this telephone call, Mr. Saffell had already pleaded guilty to a drug trafficking charge and was working with the government as a confidential informant. (App. 274a-284a.) Mr. Saffell would be the "star" witness in the case that the government subsequently mounted against Mr. Wright. At trial, Mr. Saffell alone would provide testimony about this conversation with Mr. Wright and drug distribution that formed the basis of the indictment.

As part of its plea agreement with Mr. Saffell, the government promised to provide Mr. Saffell with the opportunity to reduce the severity of his own sentence by assisting law enforcement authorities, including by setting up undercover narcotics purchases—*i.e.*, "controlled drug buys." (*Id.*) To ensure the integrity of such transactions and

safeguard evidence collected in connection therewith, the government typically follows a standard procedure:

> law enforcement officers search the informant to make sure that she does not have any illegal narcotics before the purchase; officers provide the informant with marked bills with which to purchase the drugs; officers place a body wire on the informant and monitor all conversations during the purchase; the informant is placed under visual surveillance during the purchase; and the informant turns over the contraband to the officers immediately after the purchase.

United States v. Clyburn, 24 F.3d 613, 615 n.1 (4th Cir. 1994). As an additional safeguard, in this instance, Sergeant Thomas Smith, a Baltimore City police officer working as a member of the DEA task force, recorded Mr. Saffell's telephone call to Mr. Wright on an audiotape. (App. 150a-151a, 158a-161a.)

Mr. Saffell testified that before making the telephone call at the officers' request, he had known Mr. Wright for approximately two years, although not by name, and that Mr. Wright had (at some unspecified point in time) provided him with drugs. (App. 238a-239a.)[2] On the day of the sting operation, Mr. Saffell and Mr. Wright spoke on the telephone for approximately five minutes, eventually agreeing to meet, according to Mr. Saffell, for purposes of arranging a drug buy. (App. 239a, 529a-530a.)

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[2] The government only charged Mr. Wright with distributing, and conspiring to distribute, cocaine base in connection with the drug sale that allegedly occurred in relation with the September 14, 2004 sting operation. (App. 489a-490a.)

3. At trial, Mr. Wright's counsel demonstrated that because the police failed to follow established evidence-control procedures, the officers who oversaw the sting operation committed a series of errors in collecting and preserving evidence, the most significant of which resulted in the loss of the audiotape of the government agent's initial telephone conversation with Mr. Wright.

Specifically, the officers who oversaw the undercover operation failed to store the audiotape of Mr. Saffell's initial contact with Mr. Wright in an evidence-control locker even though, as one task member admitted, "any competent officer would know [to do]" so. (App. 159a-161a.) Because the government lost this audiotape, it was never provided to Mr. Wright in discovery (despite specific demands) and was not introduced or otherwise available for Mr. Wright's defense at trial. The loss of this evidence severely prejudiced Mr. Wright's entrapment defense: the factual considerations on which an entrapment defense rests (inducement and predisposition) are supposed to be evaluated at the point of the government agent's initial contact with the defendant.[3]

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[3] *See Jacobson v. United States*, 503 U.S. 540, 548-49 (1992) ("Where the Government has induced an individual to break the law and the defense of entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."); *United States v. McLernon*, 746 F.2d 1098, 1112-14 (6th Cir. 1984) (holding that the defendant had been entrapped as a matter of law because, *inter alia*, the audiotape of the initial contact between the informant and the defendant showed that the defendant responded with reluctance and awkwardness when approached about committing the crime); *cf. United States v. Rodriguez*, 858 F.2d 809, 816 (1st Cir. 1988) ("If entrapment occurred in this case, it took place at the initial meeting.").

The government chose not to elicit testimony regarding the nature of the telephone call despite its importance to the case. Members of the DEA taskforce admitted that the lost audiotape of the initial telephone call was "key evidence in this case" and testified that the missing audiotape might "contain conversations that allegedly would demonstrate some intent on the part of these two individuals to put together some sort of drug deal." (App. 158a-161a, 316a.) But none of the officers testified regarding the contents of the audiotape or the underlying conversation itself and thus never addressed whether Mr. Saffell attempted to induce Mr. Wright to commit a crime during that discussion, as he did during an in-person meeting that followed shortly thereafter (discussed further below).

As for Mr. Saffell, he only testified that he "[s]et up a time when [he] was to come over and pick [Mr. Wright] up" during the initial telephone call. (App. 239a.) Mr. Saffell never discussed what was said during the remainder of the five-minute conversation. Mr. Saffell was not a credible witness and therefore would not have been a suitable substitute for the missing audiotape in any case. Because Mr. Saffell was cooperating with the government in an effort to mitigate his own criminal liability, Mr. Saffell had a powerful incentive to induce Mr. Wright to participate in a drug transaction. Moreover, Mr. Saffell admitted at trial that he had been caught trafficking in cocaine and Ecstasy while he was working for the government as an informant. (App. 279a-283a, 236a-238a.) Mr. Saffell's drug-trafficking activities breached the very agreement with the government according to which he had promised to testify truthfully at trial and thus further damaged his credibility.

The DEA agents and task force officers involved in the undercover operation conceded that they made several other mistakes in carrying out the sting and lost visual contact with Messrs. Saffell and Wright on multiple occasions. (*See, e.g.*, App. 205a-207a, 210a, 312a-313a.) These failures and closely-related problems with their surveillance equipment further compromised the integrity of the objective evidence obtained through the operation and thereby exacerbated the prejudice caused by the government's loss of the audiotape of the controlled telephone call.

First, the officers admitted that the pre-meeting search of Mr. Saffell was apparently ineffective and that "it [was therefore] possible that Mr. Saffell brought drugs [of his own] into" the vehicle. (App. 318a-319a.) This failure was particularly significant because the officers themselves never witnessed the alleged drug exchange and therefore were forced to rely on Mr. Saffell's statement that Mr. Wright and a source Mr. Saffell met through Mr. Wright provided Mr. Saffell with the cocaine base subsequently charged in the indictment. (App. 210a.)

Second, the audio/videotape equipment installed in the undercover automobile used in the sting operation had a history of malfunctioning—one of the officers testified that he and other members of the taskforce believed that the equipment had been "altered or damaged" (App. 210a)—and produced an audio recording on this occasion that was inaudible in many instances. (*See, e.g.*, App. 210a, 249a-251a, 169a-170a.) The taskforce members also provided Mr. Saffell with a "kel-set" (*i.e.*, a portable audio recorder), but the officers were unable to monitor the conversation between Messrs. Saffell and Wright via that device because the sound quality of the recording produced by the kel-set recorder was

even less clear than the audio recording produced by the audio/videotape equipment installed in the undercover automobile. (*See* App. 169a-170a.)

Third, the taskforce officers did not tell Mr. Saffell where the video camera installed in the uncover automobile was located. (App. 245a-246a.) Mr. Saffell's arm was blocking the lens of the camera for much of the operation. (App. 269a-270a.) The resulting video recording did not depict what Messrs. Wright and Saffell were doing for most of the operation.

Fourth, the taskforce members lost sight of Messrs. Saffell and Wright at various points including when Messrs. Saffell and Wright left the automobile on two occasions. (*See, e.g.*, App. 312a-320a, 210a.) Because none of the officers witnessed Mr. Wright or his alleged drug supplier providing drugs to Mr. Saffell, the drugs they received from Mr. Saffell after the operation—and the government then charged Mr. Wright with distributing—may have been procured by Mr. Saffell from another source.

Collectively, these errors undermined the very purpose of the controlled drug buy. A controlled-buy narcotics case is supposed to turn on the credibility of the processes employed by the police, not the trustworthiness of the government's informant. When such an operation functions as designed, the informant is merely a tool used by law enforcement to set the sting in motion and the defendant is charged with a crime that is essentially captured on audio and/or videotape. Here, there was no objective evidence of any drug exchange. Instead, Mr. Wright was convicted on little more than Mr. Saffell's word.

4. The limited audiotape evidence produced via the faulty audio/video equipment showed that Mr. Saffell continuously badgered Mr. Wright to participate in a drug transaction during a conversation that lasted roughly two hours.

Almost immediately upon meeting Mr. Wright, Mr. Saffell began cajoling him by invoking his friendship—his "love"—for Mr. Wright. (*See, e.g.*, App. 491a.) As their conversation progressed, Mr. Saffell tried to coax Mr. Wright to broker a drug sale, offering to arrange sex with women for Mr. Wright if he went along with Mr. Saffell's proposal. (App. 501a.) Mr. Saffell subsequently and repeatedly offered Mr. Wright money in exchange for brokering a drug deal. (App. 491a-528a, 253a-257a.) At other points, Mr. Saffell sought to play on Mr. Wright's sympathy, telling Mr. Wright, for example, that he needed the proceeds from the requested narcotics transaction so he could support his daughter's mother. (App. 520a-521a.) Mr. Saffell also coached Mr. Wright on how to arrange the drug transaction and reassured Mr. Wright that his plan was failsafe. (App. 499a.)

For nearly two hours, even by Mr. Saffell's account, Mr. Wright listened to Mr. Saffell's importuning but did not broker the requested transaction. Mr. Wright explained to Mr. Saffell on more than one occasion that he wanted to focus instead on pursuing a legitimate, full-time job. (App. 492a-494a, 502a, 506a, 510a, 513a-514a, 273a.) Indeed, Mr. Wright insisted on stopping at Burger King and a local grocery store to apply for a job. (*Id.*)

Mr. Saffell, however, continued to plead with Mr. Wright to assist him in buying cocaine base. (App. 492a-514a.) According to Mr. Saffell, Messrs. Wright and Saffell eventually drove to meet with Dante Couther, who provided

Mr. Saffell the drugs that the government then charged Mr. Wright with distributing and conspiring to distribute to Mr. Saffell. (App. 244a.)

5. Relying on the government's loss of the audiotape and evidence showing that Mr. Saffell sought to induce Mr. Wright to broker the narcotics sale, Mr. Wright moved at the close of the government's case for judgment of acquittal based on entrapment. (App. 374a-375a.) The district court denied Mr. Wright's motion and prohibited Mr. Wright from presenting an entrapment defense to the jury. (App. 375a-379a.) Mr. Wright later asked the district court to instruct the jury that it could draw an adverse inference against the government based on the loss of the audiotape. (App. 354a-355a, 391a-394a.) The district court also denied this request, reasoning that Mr. Wright was unable to show that the task-force members acted in bad faith. (App. 391a-394a.)

6. The Fourth Circuit affirmed the judgment of the district court. First, the court held that the district court did not err in barring Mr. Wright from presenting his entrapment defense to the jury. Finding that the evidence of inducement offered by Mr. Wright in support of his entrapment defense was not "extreme," the court held that that Mr. Wright had not met his burden of producing "more than a scintilla of evidence" that the government induced Mr. Wright to participate in the charged drug transaction. (App. 6a-9a.)

The Fourth Circuit then held that the district court did not abuse its discretion in failing to sanction the government for its loss of the audiotape of the controlled telephone call. (App. 9a-11a.) In the proceedings below, the government argued that sanctions were not warranted—notwithstanding its loss of crucial evidence that it conceded was required to preserve and make available to the defendant—because Mr.

Wright had not shown that the loss of the audiotape amounted to a violation of Mr. Wright's rights under the Due Process Clause. (Appellee's Br., Case No. 06-4538, 2008 WL 4656601, at § III(C) (4th Cir. Oct. 6, 2008).) Although Mr. Wright argued on appeal and in the district court proceedings that he was entitled to an adverse-inference jury instruction (rather than dismissal of the indictment, the relief ordinarily granted for Due Process violations) and did so based on federal case law establishing and discussing the trial court's inherent authority to supervise its proceedings and sanction parties for spoliation of evidence as necessary to level the evidentiary playing field, rather than the Due Process Clause, the Fourth Circuit focused instead on the "bad faith" requirement established in *Youngblood* for Due Process Clause violations. (App. 9a-11a.) Without addressing the cases Mr. Wright cited in which the Fourth Circuit and other courts held that bad faith is not required to warrant sanctions for spoliation on non-constitutional grounds, the Fourth Circuit held that the district court did not abuse its discretion in denying Mr. Wright's request for an adverse-inference instruction because criminal defendants are not entitled to such relief in "the absence of any bad faith on the part of the government." (*Id.*)

REASONS FOR GRANTING THE PETITION

This Court should grant review to make clear that federal courts are competent to sanction the government in criminal cases for negligently failing to preserve evidence and to resolve differences that currently exist among federal appellate courts regarding the circumstances under which a defendant is entitled to present an entrapment defense to the jury. Regarding the first question presented, as other circuit

courts have recognized, a defendant's ability to effectively present a defense can be just as severely prejudiced by losses of evidence that are not the product of the government's bad faith. The authority of district courts to hold the government accountable for such losses is therefore essential to the fair and impartial administration of justice. Regarding the second question presented, the Fourth Circuit's decision in the instant case conflicts with the law of its sister circuits and creates unnecessary confusion concerning the applicability of a well-established and important affirmative defense.

I. THE COURT SHOULD GRANT REVIEW IN THIS CASE TO SETTLE WHETHER FEDERAL COURTS MAY SANCTION A GOVERNMENT'S FAILURE TO PRESERVE EVIDENCE ABSENT A SHOWING OF BAD FAITH

The Fourth Circuit's decision in this case clashes with the opinions of other circuit courts and creates confusion about the standard that applies in assessing whether the government in a criminal case should be sanctioned for failing to preserve evidence it has a non-constitutional duty to maintain and make available to the defense. This is an important question[4] that this Court has not addressed since announcing its decision in *Youngblood*, the seminal case governing a trial court's ability to sanction the government

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[4] JAMIE GORELICK ET AL., DESTRUCTION OF EVIDENCE CUMULATIVE SUPPLEMENT 339 (WOLTERS KLUWER 2009) ("Because *Youngblood* seems significantly to restrict the circumstances under which a criminal defendant can obtain relief for destruction of evidence by law enforcement officials under the due process clause of the United States Constitution, alternate doctrines have become even more important.").

where loss or destruction of evidence arises to the level of a Due Process Clause violation.

In *Youngblood*, 488 U.S. at 58, this Court held that a defendant must "show," among other things, "bad faith on the part of the police" in losing or destroying evidence to justify sanctions for violations of the Due Process Clause. This Court had previously explained that absent a showing of bad faith, the Constitution does not require a court to "choose between barring further prosecution or suppressing . . . the State's most probative evidence." *California v. Trombetta*, 467 U.S. 479, 487 (1984). As *Youngblood* made clear, requiring a showing of bad faith as a predicate to discovery-related Due Process Clause sanctions was necessary to "limit[]" and "confine[]" such relief to the "class of cases where the interests of justice most clearly require" severe remedies. *Youngblood*, 488 U.S. at 58. The *Youngblood* Court's concern about confining such sanctions to a limited set of cases is in keeping with the concern this Court has expressed in other cases governing police conduct regarding the line-drawing problems that invariably arise where the pertinent legal obligation emanates from a broad constitutional proscription, rather than a specific statutory command.[5]

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[5] The Court was

> unwilling[] to the read the "fundamental fairness" requirement of the Due Process Clause as imposing on the police *an undifferentiated and absolute duty* to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the police both *limits the extent of the police's obligation to preserve evidence to reasonable*

By its terms, *Youngblood* did not address the standards lower courts should apply in deciding whether to sanction the government for violating non-constitutional duties to preserve evidence, such as those imposed by statute and the Federal Rules of Criminal Procedure. *See, e.g.*, FED. R. CRIM. P. 16. As the government acknowledged in the proceedings below, however, the *Youngblood* Court implicitly recognized that an adverse-inference jury instruction (the relief request by Mr. Wright here) could be granted without a showing of bad faith.[6]

Both before and after *Youngblood*, federal appellate courts commonly imposed sanctions on the government for violating non-constitutional duties to preserve evidence without requiring a showing of bad faith. For example, in *United States v. Loud Hawk*, Justice Kennedy writing for a majority of the Ninth Circuit explained that sanctions are available in cases where the loss of evidence is not of "constitutional dimensions" and that the applicable standard, while considering whether the government acted with some degree of fault, allows for sanctions where negligence, rather than bad faith, is involved.[7] In short, the appropriateness of

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> *bounds* and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Youngblood, 488 U.S. at 58 (internal citation omitted) (emphasis added).

[6] (Appellee's Br., Case No. 06-4538, 2008 WL 4656601, at § III(C) (4th Cir. Oct. 6, 2008)); *see also Youngblood*, 488 U.S. at 54.

[7] 628 F.2d 1139, 1152 (9th Cir. 1979) (endorsing a flexible three-part test considering "(1) the degree of *negligence or* bad faith involved, (2) the importance of the lost evidence, and (3) the sufficiency of other evidence

sanctions depends upon a flexible "balancing of the quality of the government's conduct and the degree of prejudice to the accused." *Id.* at 1152.

Thus, in *United States v. Riley*, 189 F.3d 802, 807-08 (9th Cir. 1999), a case materially similar this one, the Ninth Circuit held that the district court should have sanctioned the government by striking an informant's testimony where the government destroyed, albeit in good faith, notes from interviews of the informant that would be probative to an entrapment defense. The court explained that the defendant was under no obligation to show bad faith as a predicate to such a sanction because the government's destruction of the interview notes deprived the defendant of important objective evidence concerning the informant's interactions with the defendant and thus prejudiced his entrapment defense.[8]

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adduced at trial to sustain the conviction" (emphasis added) (internal quotation marks and citation omitted)), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008).

[8] That the defendant could examine the informant and the officers was not a sufficient substitute for the destroyed notes. *Riley*, 189 F.3d at 807-08 ("[W]e do not see how recalling Ryan [the law enforcement officer] or Dufriend [the informant] could cure the problem in this case. . . . We simply cannot tell without the notes. This is the Catch-22 caused by the destruction of the notes. But since it was of the government's doing, it must live with the consequences. . . . In sum, we are not persuaded that the error is harmless in view of the lack of any substitute for Dufriend's statement other than the recollections of Dufriend and Ryan, the critical nature of Dufriend's testimony on Riley's entrapment defense, and the district court's finding of prejudice."); *see also United States v. Carrasco*, 537 F.2d 372, 378 (9th Cir. 1976) (holding that testimony of a cooperating witness should be struck under similar circumstances even if the responsible officers did not act in bad faith and the defendant's evidence of inducement (and hence entrapment) is "sparse").

Other federal appellate courts have reached the same conclusion. For example, in *United States v. Ramirez*, the Fifth Circuit held that "sanctions should be imposed in cases of bad faith *and negligent* suppression of evidence."[9] Similarly, in *United States v. Davis*, 244 F.3d 666, 671-73 (8th Cir. 2001), the Eighth Circuit explained that the government's bad faith, *i.e.*, "intentional or willful" misconduct, was not a threshold requirement for sanctions, although bad-faith destruction of evidence would serve to justify a sanction "even in the absence of prejudice" to the defendant. Indeed, before its decision in the instant case, the Fourth Circuit had likewise upheld sanctions against the government in criminal cases for discovery violations despite an absence of evidence of bad faith.[10]

In this case, however, the Fourth Circuit held that Mr. Wright was not entitled to even an adverse-inference instruction and that the district court therefore acted appropriately in declining to hold the government accountable for its loss of important evidence the government

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[9] 174 F.3d 584, 589 (5th Cir. 1999) (emphasis added) (citing *United States v. Bryant*, 439 F.2d 642, 651 (D.C. Cir. 1971)). The Fourth Circuit cited another Fifth Circuit case, *United States v. Wise*, 221 F.3d 140 (5th Cir. 2000), for the proposition that "before an adverse inference instruction can be given" there must be a finding of "'bad faith conduct.'" (App. 9a-11a.) In fact, the Fifth Circuit in *Wise* held that sanctions are warranted where the government has engaged in "bad conduct." *Wise*, 221 F.3d at 156. As *Ramirez* and other cases show, the Fifth Circuit's use of the term "bad conduct" merely reflects the requirement that the government act with some degree of fault as a predicate to sanctions.

[10] *See United States v. Hastings*, 126 F.3d 310, 317 (4th Cir. 1997) (citing *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 463-64 (4th Cir. 1993), in upholding decision to sanction absent bad faith and noting that relevant factors were "similar" to those used "in a civil context").

was without question required to preserve and make available to the defense.[11] The Court of Appeals imported the "bad faith" element found necessary by this Court to "limit[]" the government's "constitutional duty" to preserve evidence under the Due Process Clause, *Youngblood*, 488 U.S. at 56, 58,[12] and made it a requirement for sanctions arising out of

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[11] In the proceedings below, the government did not contend and the Fourth Circuit did not dispute that the government had a duty to preserve the audiotape of the controlled telephone call. "It is well-settled that a party has a duty to preserve material evidence . . . ." *Stallings v. Bil-Jax, Inc.*, 243 F.R.D. 248, 251 (E.D. Va. 2007). This duty arises during litigation and "extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). The Federal Rules of Criminal Procedure expressly require the government to preserve material tangible evidence, such as audiotapes, for inspection by the defense. FED. R. CRIM. P. 16(a)(1)(E) (permitting inspection of all "documents, data . . . or tangible objects . . . within the government's possession . . . and . . . material to preparing the defense"). Accordingly, the government was under an obligation to preserve the audiotape of the controlled call.

[12] *Compare* (App. 11a ("[W]ithout bad faith there was simply no basis for an inference that the tape was adverse to the government.")) *with Youngblood*, 488 U.S. at 58 (requiring evidence of bad faith to infer that evidence would have been exculpatory and that destruction/loss of the same would have benefited defendant). Other federal courts have recognized, however, that an adverse-inference jury instruction, a relatively mild discovery sanction, can be appropriate where there has been no showing of bad faith. *See, e.g., Louisville Gas & Elec. Co. v. Cont'l Field Sys., Inc.*, 420 F. Supp. 2d 764, 768 (W.D. Ky. 2005) (imposing adverse-inference instruction when the plaintiffs' expert accidentally lost key evidence); *Shipley v. Dugan*, 874 F. Supp. 933, 940 (S.D. Ind. 1995) (granting plaintiff's request for adverse-inference instruction where defendants inadvertently destroyed documents they were under duty to preserve because the plaintiff's "ability to prove her case ha[d] clearly been burdened by [d]efendants' destruction of the [evidence]").

the government's duty to preserve evidence by statute and rule.[13] Because the Fourth Circuit (like its sister circuit courts) routinely upholds sanctions—including even very punitive ones—in civil cases without requiring a finding of bad faith,[14] the court's decision had the effect of transforming the Due Process Clause from a sword of the citizen to a shield of the State, effectively removing from review and possible sanction all but the most egregious of the government's discovery violations.[15] That Mr. Wright should be denied relief where evidence was lost under circumstances where General Motors would be entitled to relief defies common sense and produces an unjust result.

The Fourth Circuit's decision represents a serious infringement upon the rights of criminal defendants as litigants and conflicts with other federal cases and should therefore be reviewed by this Court.

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[13] (App. 9a-11a.) The government did not dispute—and the Fourth Circuit did not remotely suggest—that the DEA task force members had not, at a minimum, acted negligently in failing to preserve the audiotape of the controlled call. To the contrary, there is ample evidence that the officer who lost the audiotape acted with at least negligence in failing to preserve evidence that he understood to be "key." *See supra* pp. 7-11.

[14] *See, e.g., Silvestri*, 271 F. 3d at 595 (upholding decision to dismiss complaint based on destruction of evidence).

[15] The Fourth Circuit's decision drew an unmistakable distinction between civil and criminal litigants and very deliberately set the bar for discovery-related sanctions *higher* for criminal defendants. (App. 9a-11a ("doubt[ing]" whether the "civil standard for sanctions for spoliation of evidence" controls in a criminal case and refusing to apply any standard in criminal cases that does not require a showing of "bad faith").)

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S AND OTHER CIRCUIT COURTS' DECISIONS REGARDING THE STANDARD OF PROOF A DEFENDANT MUST SATISFY TO PRESENT THE ENTRAPMENT DEFENSE TO A JURY

This Court also should grant certiorari because the Fourth Circuit's decision concerning the preliminary showing a defendant must make to present his entrapment defense to the jury conflicts with relevant decisions of this Court and other circuit courts. This is an important federal question, as this standard controls whether, and under what circumstances, a jury may consider an affirmative defense that, if accepted, renders the accused legally innocent.

In *Mathews v. United States*, 485 U.S. 58, 62 (1988), this Court held that a defendant "is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment."[16] After struggling to define what constitutes "sufficient evidence" of entrapment under *Mathews*, circuit courts have adopted different standards, although nearly all purport to establish a low threshold for proceeding with an entrapment defense. The First Circuit requires "some evidence" of inducement and lack of predisposition;[17] the D.C. Circuit requires

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[16] As this Court has explained, entrapment is an affirmative defense. The defense bears the burden of proving that he was induced by the government agent to commit the charged crime. If he meets this burden, the government may still prevail by proving beyond a reasonable doubt that the defendant was predisposed to commit the crime when first contacted by the government agent. *See, e.g.*, *Jacobson*, 503 U.S. at 548-49.

[17] *United States v. Joost*, 92 F.3d 7, 12 (1st Cir. 1996).

evidence of entrapment that is "not so weak as to be non-existent";[18] the Eleventh Circuit requires "any evidence" of inducement;[19] the Ninth Circuit requires "slight evidence" of inducement and lack of predisposition;[20] the Fourth Circuit purports to require "more than a scintilla of evidence" of inducement but, as discussed below, in fact applies a much higher standard;[21] and the Fifth Circuit has rejected the more-than-a-scintilla-of-evidence standard in favor of a "prima facie showing" of inducement and lack of predisposition.[22]

Even more significantly, circuit courts are at odds regarding the type of government conduct that constitutes inducement sufficient to permit the defendant to present an entrapment defense to the jury. In this case, the Fourth Circuit decided that to raise a valid entrapment defense, a defendant must show that the actions of the government agent were "extreme."[23] Deciding that the government

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[18] *Johnson v. United States*, 317 F.2d 127, 130 (D.C. Cir. 1963).

[19] *United States v. Orisnord*, 483 F.3d 1169, 1178 (11th Cir. 2007) (internal quotation marks and citation omitted).

[20] *United States v. Kessee*, 992 F.2d 1001, 1003 (9th Cir. 1993) (adding that the "evidence may be weak, insufficient, inconsistent, or of doubtful credibility" (internal quotation marks and citations omitted)); *see Notaro v. United States*, 363 F.2d 169, 174 n. 6 (9th Cir. 1966) (describing the defendant's burden as "insignificant").

[21] (App. 6a-9a.)

[22] *United States v. Bradfield*, 113 F.3d 515, 522 (5th Cir. 1997); *see United States v. Branch*, 91 F.3d 699, 712-13 (5th Cir. 1996); *United States v. Nations*, 764 F.2d 1073, 1080 (5th Cir. 1985) ("There remains the question of *how much* evidence of inducement and non-predisposition is required to obtain an entrapment instruction. We have noted some uncertainty about the answer to this question." (emphasis in original)).

[23] (App. 8a.)

agent's acts neither individually nor collectively rose to such a level, the Fourth Circuit concluded that Mr. Wright failed to raise a valid entrapment defense and thus was not entitled to present an entrapment defense to the jury.[24]

In so ruling, the Fourth Circuit held that Mr. Wright failed to produce more than a scintilla of evidence of inducement, even though the government agent, who was in the best position to assess Mr. Wright's willingness to broker the transaction, found it necessary to badger Mr. Wright for nearly two hours in an effort to persuade him to proceed with the deal.[25] The government agent, *inter alia*, repeatedly offered Mr. Wright money and sex with women, played on Mr. Wright's sympathy by telling Mr. Wright that he needed money for his daughter's mother and that he loved Mr. Wright, coached Mr. Wright on how to broker the sale, and assured Mr. Wright that he had a fail-safe plan to complete the transaction.[26]

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[24] (*Id.* at 6a-9a.)

[25] In assessing whether Mr. Wright provided sufficient evidence of inducement to present his entrapment defense to the jury, the Fourth Circuit relied in part on Mr. Wright's conduct, cherry picking conduct demonstrating Mr. Wright's willingness to participate in the transaction and ignoring conduct demonstrating Mr. Wright's reservations. (App. 7a-8a.) This Court has explained, however, that federal courts assess inducement by looking to the acts of the *government agent*, whereas the defendant's conduct—his "ready commission of the criminal act"—goes to predisposition, *Jacobson*, 503 U.S. at 550, and predisposition is merely a question of fact for the jury, *Masciale v. United States*, 356 U.S. 386, 388 (1958). The Fourth Circuit conflated the two elements and, in doing so, relied on considerations that at most show that the government could have presented its case to the jury in holding that Mr. Wright was prohibited from presenting his entrapment defense to the jury.

[26] (App. 6a-9a.)

The Fourth Circuit's decision that none of the government agent's acts—even in combination and considered in the light most favorable to the defendant—amounted to more than a scintilla of evidence of inducement demonstrates that the Fourth Circuit is actually applying a standard much higher than that employed by this Court and other circuit courts.[27] This Court and other circuit courts on several occasions have found similar, and even less extreme, evidence of inducement sufficient to entitle a defendant to present an entrapment defense.

For example, although the Fourth Circuit decided that Mr. Saffell's offers of money to Mr. Wright for participation in a drug deal were insufficient to permit Mr. Wright to proceed with an entrapment defense,[28] this Court and the D.C. Circuit have concluded that the mere offer of any financial reward in return for committing a crime is sufficient to entitle a defendant to an entrapment instruction. In *Masciale v. United States*, this Court held that the defendant was entitled to present an entrapment defense to the jury where the only evidence of inducement was that a government informant used the lure of easy income to persuade the defendant to enter the drug trade.[29] Similarly, in

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[27] *See generally United States v. Boone*, 543 F.2d 412, 414 (D.C. Cir. 1976) ("In passing on the necessity for an entrapment instruction the court should have considered the evidence in the light most favorable to the defendant."); *United States v. Anglada*, 524 F.2d 296, 298 (2d Cir. 1975) ("[I]n deciding whether a jury question is raised, the trial judge must consider the evidence in the light most favorable to the defendant.").

[28] (App. 6a-9a.)

[29] 356 U.S. at 388 (noting that the defendant-petitioner's testimony that the government agent "persuade[d] him to sell narcotics by using the lure

Johnson v. United States, 317 F.2d 127, 128 (D.C. Cir. 1963), the only evidence of inducement was "the furnishing by the officer of government money" to the defendant in return for participating in a drug deal. The D.C. Circuit concluded that this was "enough to raise a factual issue of official inducement for the jury to decide one way or the other."[30] The Ninth Circuit has reached the same conclusion.[31]

Contrary to the Fourth Circuit's decision, several circuits have also held that "dogged insistence," pleading, fraudulent representations, and appeals to need, sympathy, and friendship constitute inducement sufficient to raise a jury question on an entrapment defense.[32] In *United States v.*

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of easy income . . . presented enough evidence for the jury to consider" his entrapment defense).

[30] *Johnson*, 317 F.2d at 128-30 (explaining that the mere furnishing by the undercover officer of government money to the defendant was sufficient to entitle the defendant to an entrapment instruction); *see Rodriguez*, 858 F.2d at 815 (holding that the defendant was entitled to an entrapment instruction where the government agent, in one conversation, repeatedly told the defendant that he would make a profit from the transaction and that the government agent would show him how to broker the narcotics transaction).

[31] *See United States v. Sotelo-Murillo*, 887 F.2d 176, 181 (9th Cir. 1989) ("Sotelo presented some evidence that Correa induced him to become involved in this scheme through the promise of pecuniary gain. This testimony is sufficient to create a jury question on the issue of inducement.").

[32] *United States v. Poehlman*, 217 F.3d 692, 698 (9th Cir. 2000) (explaining that "the government induces a crime when it creates a special incentive for the defendant to commit the crime" and that the "incentive can consist of anything that materially alters the balance of risks and rewards bearing on the defendant's decision"); *United States v. Montañez*, 105 F.3d 36, 39 (1st Cir. 1997) ("[A] reasonable jury could

Boone, 543 F.2d 412, 414 (D.C. Cir. 1976), the D.C. Circuit explained that a defendant need not show "evidence of urgent pleas, threats or substantial pressure" to obtain an entrapment instruction. The mere "testimony of the agent's offer: 'I would make it worth your while' was a sufficient promise of reward, when taken with Boone's other testimony [that the defendant accompanied the agent during the transaction at the agent's request], to require an entrapment instruction."[33]

This Court and at least two circuits have specifically stated that the government pressure necessary to allow a defendant to avail himself of an entrapment defense need not

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have concluded from the evidence presented at trial that [the government agent] improperly induced [the defendant] to distribute the crack by claiming that she could lose her children if the sale did not go through."); *Joost*, 92 F.3d at 12-13 ("[P]roof of opportunity plus 'something else' may be adequate to meet a defendant's burden."); *Rodriguez*, 858 F.2d at 811, 815-16 (a government agent's calling the defendant four times in one day constituted "dogged insistence" warranting an entrapment instruction); *Nations*, 764 F.2d at 1080 ("We have held that 'persuasion or mild coercion' and 'pleas based on need, sympathy, or friendship' constitute sufficient inducement to permit jury consideration of the entrapment issue."); *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985) (internal citations omitted) (noting that the defendant may meet his initial burden of production regarding inducement by "demonstrating that he had not favorably received the government plan, and the government had had [sic] to 'push it' on him or that several attempts at setting up an illicit deal had failed and on at least one occasion he had directly refused to participate"); *Boone*, 543 F.2d at 413 ("A claim of inducement is usually founded upon evidence that the defendant was threatened, harassed, pressured, or inveigled by promises or urgent pleas based on need, sympathy, or friendship.").

[33] *Boone*, 543 F.2d at 414 (holding that "the evidence of inducement necessary to support an entrapment instruction should be [even] less" where, as here, the defendant acted as an aider and abettor rather than a principal in a drug transaction).

be "extreme" (as the Fourth Circuit held),[34] but rather can be "mild" or even "subtle."[35] In *Sherman v. United States*, 356 U.S. 369, 371 (1958), this Court found that the government agent induced the defendant to commit the crime by establishing a friendly relationship with the defendant and then appealing to the defendant's sympathy by asking him to supply narcotics to the government agent to ease his alleged suffering as a fellow drug user. Similarly, in *Sorrells*, 287 U.S. at 439-41, this Court concluded that the government agent's repeated requests to engage in illegal activity, made in an atmosphere of comradery among veterans, constituted inducement to commit the charged crime.

The Fourth Circuit's holding contravenes this Court's decisions, splits from those of other circuit courts, and therefore warrants this Court's review.

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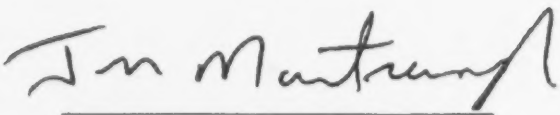
[34] (App. 8a.)

[35] *See Poehlman*, 217 F.3d at 701 ("Cases like *Jacobson*, *Sherman* and *Sorrells* demonstrate that even very subtle governmental pressure, if skillfully applied, can amount to inducement."); *Nations*, 764 F.2d at 1080 ("We have held that 'persuasion or mild coercion' and 'pleas based on need, sympathy, or friendship' constitute sufficient inducement to permit jury consideration of the entrapment issue."); *see Kessee*, 992 F.2d at 1003 (finding sufficient evidence of inducement to raise a jury question where the government agent repeatedly suggested that the defendant sell drugs for him and the defendant lost both his jobs).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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AUGUST 31, 2009

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-4538

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

JAMES WRIGHT,
Defendant – Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, District Judge. (1:05-cr-00078-RDB)

Argued: March 27, 2009
Decided: April 28, 2009

Before WILKINSON, MOTZ, and GREGORY, Circuit Judges.

Affirmed by unpublished per curiam opinion

Argued: Danielle Tarin, WHITE & CASE, Washington, D.C., for Appellant. James Thomas Wallner, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore,

Maryland, for Appellee. ON BRIEF: Jonathan M. Mastrangelo, WHITE & CASE, Washington, D.C., for Appellant. Rod J. Rosenstein, United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

This case arises out of defendant's participation in a controlled drug buy. A jury found defendant guilty of one count of conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base, 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1) and (b)(1)(A); and one count of possession with intent to distribute 50 grams or more of cocaine base, 21 U.S.C. § 841(a)(1) and (b)(1)(A), and aiding and abetting the same, 18 U.S.C. § 2. Defendant appeals his conviction on multiple grounds. We affirm the judgment.

I.

A.

On September 14, 2004, a group of law enforcement officers met with Jeffrey Saffell, a confidential informant they had used previously, and directed him to call defendant James Wright to arrange a purchase of cocaine base. Saffell had known defendant for two years and had obtained drugs from him in the past. Just as he had done before, Saffell called defendant at home to set up the buy. In less than five minutes, Saffell arranged to purchase drugs from defendant and agreed on a time that he would pick up defendant. The officers monitored and recorded

this phone call, but one of the officers subsequently lost the tape recording. The officer testified that he lost the tape while moving when he was transferred back to headquarters the day after the incident. There is no allegation that any bad faith was involved.

Next, as is customary with a controlled buy, one of the officers searched Saffell to ensure that he was not in possession of any contraband, money, or drug paraphernalia. The officers then gave Saffell $2,000 to purchase the drugs, a scale to weigh the drugs, and a vehicle to use for the operation. Saffell was wired with a radio transmitter and the vehicle was equipped with a video recorder and radio transmitter.

Driving the government vehicle, Saffell then picked defendant up at home, just as he had done during their prior drug transactions. Almost immediately upon entering the car, defendant asked Saffell "What's up? What you trying to do?" Saffell responded in slang that he was trying to get two ounces of crack cocaine. Without any hesitation or delay, defendant borrowed Saffell's phone to call one of his drug suppliers—one of his "sources" or "connects." The source agreed to provide the drugs, but said that it would take fifteen minutes.

This source took too long, so defendant called another one of his sources. They arranged to meet, but the transaction was further delayed because there were too many police officers in the neighborhood where they had chosen to meet. While defendant and Saffell were waiting for defendant's sources, they drove around Baltimore to "burn time" and had an extensive, almost two hour conversation about drug dealing, women, and other aspects of their lives. They also made two stops: one at a convenience store

to buy cigarettes and one at a truck driving business so that defendant could pick up a job application. Except for the two stops, the entire conversation between defendant and Saffell was recorded by the video camera in the car.

Ultimately, defendant was successful in setting up the drug buy with Dante Couther, someone whom Saffell recognized from a previous drug transaction arranged by defendant. Saffell testified that they picked Couther up in the car and gave him the $2,000; they then drove Couther to another location where he obtained the cocaine; and finally, Couther gave the cocaine to defendant who quickly examined it and then handed it over to Saffell. The transaction was complete.

Saffell dropped off defendant and Couther, and then met up with the police officers who had been monitoring the operation. He gave the officers the two ounces (approximately 55 grams) of cocaine that he had purchased through defendant. The police immediately arrested defendant and Couther.

B.

A grand jury indicted defendant and Couther on one count of conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base, 21 U.S.C. § 846, 21 U.S.C. § 841 (a) (1) and (b) (1) (A); and one count of possession with intent to distribute 50 grams or more of cocaine base, 21 U.S.C. § 841(a)(1) and (b)(1)(A), and aiding and abetting the same, 18 U.S.C. § 2. Defendant was tried before a jury beginning on September 12, 2005. The government's case-in-chief included testimony from Saffell and the officers who arranged and monitored the controlled buy. During Saffell's testimony, the government

played portions of the videotape of the car ride. The government also provided the jury with a transcript of the video to use as an aid, but the transcript was not entered into evidence.

During cross-examination, defendant's counsel elicited testimony from various witnesses to undermine Saffell's credibility, including that he breached the plea agreement he was cooperating under by participating in unauthorized drug transactions. Defendant's counsel also pointed out that the officers committed several minor errors in executing and documenting this operation that deviated from police practice.

At the close of the government's case-in-chief defendant made a motion for judgment of acquittal on three grounds: (1) the denial of due process premised on the government's mishandling of various evidence, including the loss of the tape of Saffell's initial conversation with defendant and alleged inconsistencies in testimony; (2) the defense of entrapment; and (3) the sufficiency of the evidence. The court denied defendant's motion. Of relevance to this appeal, the court rejected defendant's entrapment claim because he had not met his initial burden of presenting evidence that the government induced him to commit the crime. In addition, the court ruled that because defendant did not request a jury instruction on entrapment, he could not argue entrapment to the jury.

Defendant also moved that the jury be instructed that it could draw an inference that the lost tape was adverse to the government's case. Exercising its discretion, the court denied the instruction because, as defendant conceded, there was no evidence that the government had acted in bad faith when it lost

the tape. Defendant did not testify and did not present any additional evidence.

The jury convicted defendant of both counts on September 15, 2005. He was later sentenced to 240 months of imprisonment. Defendant appeals his conviction.

II.

All of defendant's arguments relate in some way to the defense of entrapment. Entrapment is an affirmative defense that consists of "two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews v. United States*, 485 U.S. 58, 62-63 (1988); *see also United States v. Hsu*, 364 F.3d 192, 198 (4th Cir. 2004) (citing *Mathews*, 485 U.S. at 62-63). Here, defendant did not meet his initial burden of producing "more than a scintilla of evidence" that the government induced him to commit the crime.* *See Hsu*, 364 F.3d at 200 (internal quotation marks omitted); *see also United States v. Sligh*, 142 F.3d 761, 762 (4th Cir. 1998).

Inducement "is a term of art: it involves elements of governmental overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party." *United States v. Daniel*, 3 F.3d 775, 778 (4th Cir. 1993); *see also Hsu*, 364 F.3d at 198 (quoting *Daniel*, 3 F.3d at 778). It requires "excessive behavior" by the government that is "so inducive to a reasonably firm person as likely to displace *mens rea*." *United States v. DeVore*,

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* Defendant's claim that he was entitled to present an entrapment defense to the jury also fails because defendant did not request a jury instruction on entrapment.

423 F.2d 1069, 1072 (4th Cir. 1970); *see also United States v. Osborne*, 935 F.2d 32, 38 (4th Cir. 1991) (quoting *DeVore*, 423 F.2d at 1072).

To support his claim of inducement, defendant first points to the fact that the government initiated the drug transaction and solicited him to broker the drug deal. It is well established that this evidence is not sufficient because inducement "requires more than mere solicitation by the government." *Hsu*, 364 F.3d at 198; *see also United States v. Ramos*, 462 F.3d 329, 334 (4th Cir. 2006); *United States v. Velasquez*, 802 F.2d 104, 106 (4th Cir. 1986).

Next, defendant points to the statements Saffell made during the car ride. Specifically, defendant alleges that Saffell offered him money and sex with women to broker the deal, played on defendant's sympathy by stating that he needed money for his daughter's mother, invoked his love for defendant, coached defendant on how to complete the transaction, and assured defendant that no one had ever been caught with him. Some forms of "persuasion or appeals to sympathy" can constitute inducement, *United States v. Squillacote*, 221 F.3d 542, 569 (4th Cir. 2000), but Saffell's statements do not come close to the types of pleading and persuasion that courts have held constitute inducement.

In fact, Saffell's statements do not involve pleading or persuasion at all. They were not offered in response to any reluctance by defendant to participate in the buy. The statements all occurred *after* defendant had begun participating in the transaction by calling one of his sources to supply the drugs. And defendant did not later show any reluctance to participate when he and Saffell were waiting for his sources to come through. Defendant notes that he

stated "once I get this money together it's game over," and that he picked up a job application while they were waiting, but these facts show at most that defendant was going to seek legitimate employment *after* completing this deal, which was already underway.

Similarly, defendant claims that Saffell offered him money to complete the deal, but payment for arranging a deal is normal in the context of a drug buy and is not generally sufficient to demonstrate inducement. *See, e.g., United States v. Diaz-Diaz*, 433 F.3d 128, 136 (1st Cir. 2005); *United States v. Glover*, 153 F.3d 749, 754 (D.C. Cir. 1998). This case is thus a far cry from a situation where the government had to make multiple requests "to overcome, first, petitioner's refusal, then his evasiveness, and then his hesitancy in order to achieve capitulation." *Sherman v. United States*, 356 U.S. 369, 373 (1958). *See also Sligh*, 142 F.3d at 763 (finding evidence of inducement where the defendant "repeatedly ignored the agent's invitations to wrongdoing," but "the agent nevertheless persisted in her baiting of [the defendant]").

Indeed, courts have found inducement only where the pleas were extreme: where an undercover agent pleaded that "unless his 'blood brother' would help him land a cocaine deal he would be killed," *United States v. McLernon*, 746 F.2d 1098, 1113 (6th Cir. 1984); where a government informant was in a narcotics addiction treatment program and preyed on the defendant's sympathy by repeatedly requesting narcotics because he was suffering from withdrawal, *Sherman*, 356 U.S. at 373; and where an undercover informant convinced the defendant to cooperate based on "a tale of financial woes, the need to support a new spouse, and terminal cancer, all the while

knowing that [defendant's] sister recently had died of cancer," *United States v. Nations*, 764 F.2d 1073, 1080 (5th Cir. 1985). Saffell's statements simply do not rise to this level.

In short, none of the statements to which defendant alludes would "persuade an otherwise innocent person to commit a crime." *Ramos*, 462 F.3d at 334 (quoting *Hsu*, 364 F.3d at 200). At best, the statements amount to the sort of "mild persuasion" that we have repeatedly held does not constitute inducement. *See Hsu*, 364 F.3d at 202 (holding that "passing mention" of "rewards" was "mere banter" that at most amounted to mild persuasion); *Daniel*, 3 F.3d at 778-79 (holding that the government's reminder "that there was money to be made and promise to avoid arousing the attention of the authorities" amounted to only mild persuasion); *see also Squillacote*, 221 F.3d at 569 (recognizing that mild persuasion is not inducement). The district court was right to observe that this case was "no more than any routine controlled buy," and that "if the evidence in this case is sufficient to carry the burden of showing government inducement," courts would be "hard pressed" to find a case that does not meet the burden.

III.

Defendant's next arguments also relate to his entrapment defense, but they are premised directly on the claim that the district court should have imposed spoliation sanctions on the government for losing the tape of Saffell's initial phone call to defendant. First, defendant argues that the lost tape was central to his entrapment defense and therefore the district court should have sanctioned the government by granting his motion for judgment of acquittal.

This argument too must fail. To begin with, the evidence did not have "an exculpatory value that was apparent before the evidence was [lost]." *California v. Trombetta*, 467 U.S. 479, 489 (1984). To the contrary, Saffell's and the officer's testimony about the initial call—that it was a controlled call where Saffell arranged to purchase drugs from defendant—shows that, in all likelihood, the tape would have further inculpated defendant. Moreover, under *Arizona v. Youngblood*, 488 U.S. 51 (1988), "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. Here, as defendant conceded, there was no evidence that the government acted in bad faith.

Because defendant cannot meet the standard required for reversal under *Trombetta* and *Youngblood*, he tries to import the civil standard for sanctions for spoliation of evidence. We doubt this standard controls in the criminal context, but even if it did, the severe sanction of an outright acquittal would not be warranted. In view of the absence of any bad faith on the part of the government and in light of the fact that the exculpatory value of the evidence was anything but apparent, the district court cannot be said to have abused its broad discretion by failing to grant the significant sanction defendant seeks. Defendant's trial counsel recognized as much when he stated: "where the issue has arisen in federal criminal cases principally it is whether the Indictment should be thrown out . . . . You have to establish bad faith for that and obviously nobody is arguing that." JA 423.

Finally, defendant argues that the district court should have at least sanctioned the government by

granting his motion for an adverse inference instruction. The district court denied defendant's motion because there was no evidence that the government acted in bad faith. This was not an abuse of discretion because without bad faith there was simply no basis for an inference that the tape was adverse to the government. Indeed, the very case upon which defendant explicitly based his proposed instruction requires "bad faith conduct" before an adverse inference instruction can be given. *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000).

IV.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX B

FILED: June 2, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-4538
(1:05-cr-00078-RDB)

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JAMES WRIGHT,
Defendant-Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Motz, and Judge Gregory.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Amended Judgment in a Criminal Case
(For Offenses Committed on or After
November 1, 1987)
Case Number: RDB-05-078
USM Number: 41845-037
Filed June 6, 2006

UNITED STATES OF AMERICA

v.

JAMES WRIGHT

Defendant's Attorney: Joseph Gigliotti, Esq
Assistant U.S. Attorney James Wallner
Date of Original Judgment May 4, 2006

Reason for Amendment:

☒ Correction of Sentence for Clerical Mistake (Fed.R.Crim.P.36)

THE DEFENDANT:

☐ pleaded guilty to count(s)____.
☐ pleaded nolo contendere to count(s) ____, which was accepted by the court.
☒ was found guilty on counts One (1) & Two (2) after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
21:846	CONSPIRACY TO DISTRIBUTE & POSSESS WITH INTENT TO DISTRIBUTE COCAINE BASE	9/14/04	1
21:841(a)(1) & 18:2	POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE; AIDING & ABETTING	9/14/04	2

The defendant is adjudged guilty of the offense(s) listed above and sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by *U.S. v. Booker*, 125 S. Ct. 738 (2005).

☐ The defendant has been found not guilty on count(s)_____

☐ Count(s)_____(is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

June 2, 2006
Date of Imposition of Judgment

/s/ Richard D. Bennett June 6, 2006
Richard D. Bennett Date
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 240 months as to Count 1; and 240 months as to Count 2 to run concurrent with Count 1. Defendant is to be given credit for time served since April 20, 2005.

☒ The court makes the following recommendations to the Bureau of Prisons: The court makes the following recommendations to the Bureau of Prisons: 1) 1)that the defendant receive vocational training while he is incarcerated; (2) the defendant shall participate in the 500 hour drug treatment program administered by the Bureau of Prisons; (3) the defendant shall receive educational training so that he may obtain her GED, if possible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at____a.m./p.m. on_____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender, at his/her own expense, to the institution designated by the Bureau of Prisons at the date and time specified

in a written notice to be sent to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

☐ before 2 p.m. on _____

☐ _____

_____

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. §3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. §3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. §3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

Defendant delivered on_____to_____ at_____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____

DEPUTY U.S. MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall comply with all of the following conditions:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

A. STATUTORY CONDITIONS OF SUPERVISED RELEASE

1.) The defendant shall not commit any federal, state or local crime.

2.) In any felony case, the defendant shall not possess a firearm or ammunition as defined in 18 U.S.C. §921.

3.) The defendant shall not illegally use or possess a controlled substance.

4.) The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

5.) Pursuant to Pub. Law 108-405, Revised DNA Collection Requirements Under the Justice for All Act of 2004, if applicable, the defendant shall cooperate in the collection of DNA while incarcerated in the Bureau of Prisons, or as directed by the probation officer.

6.) If this judgment imposes any criminal monetary penalty, including special assessment, fine, or restitution, it shall be a condition of supervised release that the defendant pay any such monetary penalty that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

B. STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall notify the probation officer within 72 hours of being charged with any offense, including a traffic offense;

13) The defendant shall not enter into any agreement to act as an informer Or special agent of a law enforcement agency without the permission of the court;

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

C. SUPERVISED RELEASE ADDITIONAL CONDITIONS

The defendant shall satisfactorily participate in a treatment program approved by the probation officer relating to substance and/or alcohol abuse, which may include evaluation, counseling, and testing as deemed necessary by the probation officer.

The defendant shall satisfactorily participate in a vocational or educational program as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 5B.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$	$

☐ CVB Processing Fee $25.00

☐ The determination of restitution is deferred until An Amended Judgment in a criminal Case (AO 245C) will be _____ entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below. If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0	$ 0	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ Restitution amount ordered pursuant to plea agreement_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(0. All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for ☐ fin ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (I) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☐ In full immediately; or

B ☐ $ _____immediately, balance due (in accordance with C, D, or E); or

C ☐ Not later than_____; or

D ☐ Installments to commence_____day(s) after the date of this judgment

E ☒ Special Assessment to be paid during the Five (5) year period of supervised release.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Unless the court expressly orders otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment All criminal monetary penalties except those payments made through the Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the Clerk of the Court.

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

☐ in equal monthly installments during the term of supervision; or

☐ on a nominal payment schedule of $ ____ per month during the term of supervision.

The U.S. probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

Special instructions regarding the payment of criminal monetary penalties:

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant Shall forfeit the defendant's interest in the following property to the United States:

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Criminal No. RDB-05-0078
Baltimore, Maryland
September 12, 2005
9:30 a.m.

UNITED STATES OF AMERICA

v.

JAMES WRIGHT,
Defendant.

TRANSCRIPT OF TRIAL BEFORE THE
HONORABLE RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:

United States Attorney's Office
By: JAMES WALLNER, ESQ.
36 South Charles Street
Fourth Floor
Baltimore, Maryland 21201

For the Defendant:

Kramon and Graham, PA
By: JOHN BOURGEOIS, ESQ.
One South Street

Suite 2600
Baltimore, Maryland 21202

Court Reporter
Lisa K. Bankins RMR
101 West Lombard Street
Room 5012
Baltimore, Maryland 21201

Proceedings recorded by mechanical stenography, transcript produced by notereading.

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[3] PROCEEDINGS

THE COURT: Mr. Wallner, if you'll call the case, please?

MR. WALLNER: Yes, Your Honor. This is United States of America v. James Wright. It is Case RDB-05-078. James Wallner for the Government.

THE COURT: Yes. And I note that you have Dwight Crawley from the Baltimore City Police Department with you.

MR. WALLNER: That is correct, Your Honor.

THE COURT: Is that Detective Crawley or Officer Crawley or—

MR. WALLNER: Task force officer, Your Honor. D.E.A. Task Force Group 51.

THE COURT: So Officer Crawley. Officer Crawley, it's nice to see you, sir. Good morning.

OFFICER CRAWLEY: Good morning, sir.

THE COURT: And good morning. For the defense?

MR. BOURGEOIS: John Bourgeois for the defense. Good morning, Your Honor.

THE COURT: Good morning.

MR. BOURGEOIS: With me is Mr. Wright.

THE COURT: Good morning, Mr. Wright, and good morning, Mr. Bourgeois. We are proceeding this morning with the jury trial in the indictment in this case. We have some pretrial matters that were discussed at the pretrial conference. [4] Mr. Bourgeois, I would note that we will have a sequestration order pursuant to Rule 615 here and certainly, anyone who's going to be a witness here

would be subject to that sequestration order in the sense that there's going to be a proffer or discussion of testimony. So any potential witnesses should not be in the courtroom. So I'll leave that to your judgment in terms of if there are any persons who are in the courtroom who might be witnesses who would be affected by proffers as to witness testimony and that applies to the Government obviously as well, Mr. Wallner.

MR. WALLNER: Well, with the exception—

THE COURT: Except for the exception of the case agent obviously.

MR. WALLNER: Yes, Your Honor.

THE COURT: First, we have the, pending before the Court is the defendant's motion—well, it's the Government's motion in limine to admit certain evidence and the defendant has couched it in terms of it being to seek to admit evidence of prior bad acts under Rule 404(b) and I have read the submissions from defense counsel and the Government response I believe I actually received this morning and I reviewed it.

MR. WALLNER: Actually, Your Honor, I apologize for that. That was done by noon on Friday.

THE COURT: Don't worry about it, Mr. Wallner. I've read it and I'm on top of the case law here on this. As I [5] understand it, this relates to the testimony of an individual named Saffell who is going to be a witness for the Government. Is that correct?

MR. WALLNER: That is correct, Your Honor.

THE COURT: And Mr. Saffell is the proffer is is that Mr. Saffell will testify that on some prior occasions, he had interaction in drug dealing with the

defendant, Mr. Wright, before the Court this morning as well as the co-defendant in this case, Mr. Couther, who has entered a plea of guilty.

Mr. Couther, however, will not be testifying for the Government as I recall. This is not a cooperation deal. Is that correct, Mr. Wallner?

MR. WALLNER: That is correct as to Mr. Couther's testimony. That is correct. He will not be testifying for the Government.

THE COURT: Now—

MR. WALLNER: I'm sorry, Your Honor. It was kind of a two-prong question. The second half would be what Mr. Saffell would testify to and I couched it in my papers to the Court in terms of it is really kind of a two-fold question. The first of which is whether Mr. Saffell had obtained drugs through Mr. Wright in the past and then again as in terms of through Mr. Wright from Mr. Couther in the past. So there really is a two-prong kind of analysis here and what I was suggesting was under the first prong of the analysis, I'm not going to go into [6] prior dealings between Mr. Wright and Mr. Saffell. I was just going to merely say that the individuals obtained drugs from him in the past. As I indicated in chambers, the transcript is replete with conversations between Mr. Saffell and Mr. Wright during this two-hour ride where Mr. Wright is trying to obtain drugs from a source. It ends up being Mr. Couther, but there are other incidents where they actually went and met other individuals and that is in the transcript that was provided in discovery. So I don't want to say that it's limited to Mr. Wright. But I'm not going to draw out any other conversations from Mr. Saffell. But in terms of Mr. Couther, obviously, there's conversa-

tions right on the transcript about we had done it once before, we were at this particular location. So clearly being, from coming from the transcript that's going to be brought out. But I wasn't going to evidence additional conversations, additional dealings except to say that there were some.

THE COURT: So the bottom line on this is that there will be references as to prior dealings between Mr. Wright and Mr. Saffell involving crack cocaine. Correct?

MR. WALLNER: That is correct, Your Honor.

THE COURT: And the Government is proffering this in the context of prior dealings without getting into the specifics of how many prior dealings or the actual dates of the prior dealings or whathaveyou.

[7] MR. WALLNER: Correct, Your Honor.

THE COURT: All right. And that is essentially the evidence.

MR. WALLNER: Correct.

THE COURT: All right. You may be seated for a minute, Mr. Wallner. Mr. Bourgeois, I've read your, essentially your motion in limine seeking to keep that evidence out.

MR. BOURGEOIS: Yes, Your Honor.

THE COURT: Reviewing the indictment in this case, the indictment in this case as you aptly note in your memorandum notes that Dante Couther, James Wright, the defendants herein in Count I did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other and others known and unknown to the grand jury to distribute and possess with intent to distribute 50 grams or

more of a mixture of cocaine base called crack cocaine and it charges that those events took place on or about September the 14th and then Count II specifically charges on or about September 14th, both Couther and Wright unlawfully possessing with intent to distribute. Now in the context of Count I with the charge of on or about and the matter of others known and unknown, the Government cited in its response the case of United States v. Kennedy, which I've read the case this morning. That's at 32 F.3rd 876. In all candor, I don't really find that to be the case really on point. That case involved multiple conspiracies. We're not really in a multiple [8] conspiracy situation here. But having said that, certainly in reading the various Fourth Circuit cases, it seems to me that there is some latitude accorded to the Government in terms of presenting evidence of others known and unknown to the grand jury on or about the date charged. Now the Government's proffer is limited to prior dealings of Saffell and Wright sometime prior to September 14th. Correct, Mr. Wallner?

MR. WALLNER: That is correct, Your Honor.

THE COURT: Without specifying the timeframe or how many transactions or the specifics of the transactions, how would that not fall within the ambit of others known and unknown to the grand jury on or about September 14th in terms of the matter of the conspiracy of Wright with Couther and others without even getting into 404(b)? The 404(b) is essentially a dropback position if it's within the exceptions of 404(b). But it seems to me that it falls within, as the Government has proffered it and it seems to be limited and I certainly would limit it and it seems to me it falls within the ambit of evidence with respect to the conspiracy.

MR. BOURGEOIS: Well, I suppose the first question is is this relevant or is it not relevant evidence to this conspiracy. And as pointed out in our papers, the conspiracy charged relates to September 14, 2004. Now it does mention on or about and what one might argue from the Government, but we're not hearing it from the Government that there may have been [9] activities immediately before or preceding September 14th that were part of this particular event which culminated in the alleged sale on the 14th of 2004 and I don't believe that's what Mr. Wallner is proffering. I think what he's trying to say and what he said in chambers is that this puts this in context of how Mr. Saffell may have known Mr. Wright in the past. Now, Your Honor, I don't believe—

THE COURT: And to the extent there were prior dealings.

MR. BOURGEOIS: Well, and the fact that there were prior dealings, however, is not part of this charged conspiracy. I think they're trying to shoehorn these alleged past acts into somehow making the conspiracy that culminated and frankly started and ended on the 14th of—

THE COURT: Well, that's precisely my point is that your argument is it started and ended on September 14th. That's not the charge here. The charge is not that it started on September 14th and it ended on September 14th. The charge is that on or about and clearly, the cases hold almost uniformly that to the extent that there's the matter of a timeframe and acts in furtherance of a conspiracy depending upon how it's limited and it's obviously within the discretion of the Court, I'm not going to permit him to have a whole potpourri of a list of dealings between Mr. Wright and Mr. Saffell. But the charge is not in

Count I that it started on September 14th and ended on [10] September 14th.

MR. BOURGEOIS: Well, Your Honor, I respectfully disagree. I mean I see the phrase on or about all the time and I think if the Government is intending to charge a conspiracy that reaches back two years as has been proffered with a series of transactions, then the Government is certainly capable of giving fair notice of that fact and in fact charging it in the indictment. But I'll go a little further, Your Honor. What the indictment charges is a conspiracy between Mr. Couther and Mr. Wright. The case law is clear that Mr.—

THE COURT: No. The indictment charges a conspiracy between Mr. Couther, Mr. Wright and others known and unknown to the grand jury. This indictment does not, this indictment is not limited just to Mr. Couther and Mr. Wright.

MR. BOURGEOIS: Your Honor, there is no evidence of which I'm aware that's been proffered that there was a prior agreement between Mr. Couther and Mr. Wright. What Mr. Saffell is being proffered to testify is that he, Mr. Saffell had on a handful of occasions in the past, may have done some drug transactions with Mr. Wright. Now if we're talking about a conspiracy among those known and unknown, that can't include Mr. Saffell if he's a government agent because there cannot be a conspiracy between Mr. Wright and a government agent. There can only be a conspiracy between Mr. Wright and a Mr. Couther or some other person. But if Mr. Saffell—

[11] THE COURT: But doesn't that relate to when Mr. Saffell becomes a government agent?

MR. BOURGEOIS: Well, we don't know when—

THE COURT: We can cut to the core of that. What are the facts—I mean essentially, the argument, Mr. Wallner, is is that Saffell is a government agent. When did Saffell become a government agent?

MR. WALLNER: He pled guilty, Your Honor, on the existing plea agreement—if this Court would give me one second?

MR. BOURGEOIS: September 7, 2003 I believe.

MR. WALLNER: June 10 of 2003 is when he pled guilty under this agreement. But as has been proffered to the Court, he actually violated this agreement which is part of the cross-examination that I'm sure Mr. Bourgeois would bring out. So essentially, even though he was acting as a government agent, he was acting on his own as well in violation of this agreement as a conspirator and other acts.

THE COURT: All right. Go ahead. Thank you, Mr. Wallner. Go ahead, Mr. Bourgeois.

MR. BOURGEOIS: Your Honor, I believe that the evidence is being offered. Now you're absolutely right. Under Kennedy and other Fourth Circuit law, you as trial judge have very broad discretion in this area.

THE COURT: And Kennedy involved multiple conspiracies [12] and that was really a multiple conspiracy case.

MR. BOURGEOIS: No. I would only cite Kennedy for the first half of the proposition which gives Your Honor broad discretion. I think the case itself is not helpful here and in fact in the context of multiple conspiracies, that context becomes a lot more important. In this case, the evidence against Mr. Wright with regard to what happened can be put forward very simply. The prior dealings, however, alleged

dealings are not necessary for the Government to make its case, but on the flip side are extraordinarily prejudicial to Mr. Wright. You know, it becomes evidence or snuck in through the back door to paint Mr. Wright in front of this jury as a drug dealer, as a prior drug dealer and we know the problems with that. We don't want a jury to say, look, he's a bad guy. He's done this in the past so we can perhaps even lower our vigilance with regard to the charges today relating to the 14th of September because if we get it wrong with regard to the 14th of September, no problem because he's generally a bad guy and that's the risk involved here. Is there relevance? I suggest that there isn't. But even if there is, it is so marginally relevant as to be not helpful to the finder of fact and then when we weigh that against the prejudice that is clearly going to accrue to Mr. Wright of allowing that evidence in, that unfair prejudice clearly outweighs the marginal if any relevance to this testimony. Moreover, it will confuse this jury and confuse the issues. He's not being tried for these [13] prior acts. We can suggest that it may or may not have been within the scope of the conspiracy. But for the Government to be able to establish prior acts as part of the predicate acts of this conspiracy, he's going to have to be able to demonstrate dates, times, quantities, the drugs.

THE COURT: Why is that the case?

MR. BOURGEOIS: Because that's generally the Government's burden in establishing—

THE COURT: No, no. As to the matter of Saffell, as to specifically as to the matter of Saffell, if the Government is limited to merely testimony that he had—leading up to September 14th, he had prior

drug dealings and crack cocaine with Mr. Wright and that's your proffer. Correct, Mr. Wallner?

MR. WALLNER: Correct, Your Honor.

THE COURT: And that is literally the extent of it. No specificity as to the number—I mean unless you're going to explore it, Mr. Bourgeois. Then you open the door obviously and you're a very experienced lawyer and I suspect you're not going to do that. We're laughing here.

MR. BOURGEOIS: I'm not that silly, Your Honor.

THE COURT: Yeah, I know. So the point is unless you open the door any further, that's limited to that without any discussion of specificity, drug quantity of any kind. Just a general statement by Saffell as to prior dealings in crack cocaine with Mr. Wright leading up to September 14th in the context of what's on the tape and that is the extent of it. Apart from the Rule 401 analysis, that it renders facts more probable than not in terms of the matter of the intent and the participation by Mr. Wright in this conspiracy with Mr. Couther, apart from any kind of 404(b) analysis and then 403 in terms of prejudice, it certainly seems to come within the ambit of the charge in Count I of the indictment. But even if we conduct a 404(b) analysis in terms of the general intent and opportunity, those exceptions within 404(b) and then assuming that even if you have to conduct that type of analysis, we then view the matter of prejudice analysis under 403, it seems to me for it to be limited to that extent, one, it's admissible in terms of the conspiracy charge; two, secondarily, it will be admissible under 404(b) within the exceptions and in terms of the exercise of this Court's discretion in terms of any prejudice to the defendant, conducting that

analysis, it seems that if it's so constrained and it seems to be very constrained that we've limited it, to this extent, I think it's appropriate. Now anything else you want to say on this point?

MR. BOURGEOIS: One last point, Your Honor.

THE COURT: All right.

MR. BOURGEOIS: Responding to Mr. Wallner's contention that the prior alleged dealings between Mr. Saffell and Mr. Wright were when Mr. Saffell was not a government agent, but was in fact running his own illegal operations or participating [15] in them, that would make him under that rubric a conspirator himself and to the extent that this evidence would come in being sponsored by Mr. Saffell as a co-conspirator of Mr. Wright's in the past, then I would suggest absent corroboration evidence that cannot come in as a statement of a co-conspirator.

THE COURT: Well, I'm not going to have it be admitted as a statement of a co-conspirator and if you want to suggest a cautionary instruction, I'll certainly give a cautionary instruction to the jury on it. That Mr. Wright is being charged in connection with the events around September the 14th. If you want to proffer some language or structure some language, I'll be glad to look at it and I will give a cautionary instruction at that time. As the Fourth Circuit has noted in terms of a preference for cautionary instructions, I'll instruct the jury that this evidence—that he's not charged with any prior dealings as to Mr. Saffell, this is merely in the context of the prior relationship of the two individuals and he's only charged as stated in the indictment with respect to events on or about September the 14th and I will give that cautionary instruction and then I will also—I

mean if you so desire, I'll instruct them that this is not a statement of a co-conspirator, admission of a co-conspirator. But I don't really think we need to—I suspect that's not really the cautionary instruction you want. I think that would confuse the jury to give that kind of instruction. I think the safest, easiest instruction is just to [16] advise the jury that he's charged with the charges in this case. That the testimony of Mr. Saffell is just relating to a prior relationship that they've had and that's the only context in which it should be accepted by the jury.

MR. BOURGEOIS: Your Honor, I see where you're going with this. I would like a cautionary instruction—

THE COURT: Okay.

MR. BOURGEOIS:—along the lines you've just discussed. I can proffer one, but it sounds to me as though you have a fairly effective one committed to memory.

THE COURT: That's fine.

MR. BOURGEOIS: And I would like to note on the record an exception to the Court's ruling.

THE COURT: Sure. And you need not re-address it at the trial of the case. The record will reflect that that exception is so noted. That you've objected. You object to Mr. Saffell testifying at all essentially. Correct?

MR. BOURGEOIS: Oh, absolutely.

THE COURT: Okay. Right. So your exception is noted to the testimony being proffered by Mr. Saffell and the record is so protected and I've explained to you how I'm going to advise the jury in a cautionary instruction. But if you want to proffer specific lan-

guage you would ask for and just give it to my clerk sometime, you know, not right this minute, but during a break, give it to my clerk before Mr. Saffell testifies, then I'll [17] certainly be willing to look at that language and provide that language, Mr. Bourgeois.

MR. BOURGEOIS: Thank you, Your Honor.

THE COURT: All right. Okay. Now any other evidentiary matters?

MR. WALLNER: Your Honor, we discussed the transcript and the editing of certain aspects of the videotape as it relates to other crimes evidence, discussions of other crimes unrelated to the conspiracy. I have provided this morning to Mr. Bourgeois a copy of a redacted transcript. I also have a copy of a redacted videotape and as I've indicated, the videotape is rather lengthy, but in an effort to redact the portions, I'll explain to the Court what I actually did. I have an original which would be the complete videotape as well as for most intents, a complete transcript. I also did, got a copy of that videotape. I placed it in the video machine. As the video played, I marked the beginnings and ends where I believed it would be evidence would be prejudicial to the defendant. I then backed up to the beginning of that session and hit record. So there are sections of the videotape which are actually just test patterns, not test patterns, but white noise and static. So I provided that information to Mr. Bourgeois. I've indicated he has the ability to see the videotape if he wishes. It seems to me that he and I have discussed or at least pointed to the parts of the transcript where he believed it should be removed. I can offer as an [18] officer of the Court, the parts he has talked about, I have removed. So the next question I guess

would be I'll give Mr. Bourgeois an opportunity to see what I have. But I will eventually need I assume for tomorrow's trial to produce enough of these transcripts—

THE COURT: For today's trial.

MR. WALLNER: Well, I don't expect to call Mr. Saffell today.

THE COURT: You mean tomorrow's testimony, but today is trial.

MR. WALLNER: Correct. Today is trial. Tomorrow for testimony. Correct. Yes, Your Honor. The copies for the jury and I guess the next issue we need to discuss which Mr. Bourgeois was going to object to was the production of this transcript.

THE COURT: All right.

MR. WALLNER: We discussed that at, during the—

THE COURT: That's fine. We'll address that now. So just the first ruling is Mr. Saffell will be able to proffer testimony to the limited extent with a cautionary instruction the evidence relating to the charge in Count I of the conspiracy between Couther and Wright and others known and unknown to the grand jury. Secondarily, apart from the matter of it being offered as evidence in furtherance of the conspiracy leading up to September 14th, the evidence would certainly go to show the intent, motive and plan and common scheme of Mr. Wright and then [19] balancing under 404(b) analysis the matter of any prejudice to defendant. I think a cautionary instruction limiting the context of it takes the appropriate precautions within the ambit of the various Fourth Circuit cases and so that's the way that will be handled. And

Mr. Bourgeois' objection to that is noted and he need not repeat it.

Now with respect to the tape itself, first of all, apart from the transcripts, Mr. Bourgeois, are you satisfied that the tape has been appropriately limited, the tape that will be played in front of the jury?

MR. BOURGEOIS: Your Honor, may I interrupt your flow? I forgot to raise one point. I don't think it's going to change Your Honor's prior ruling. But I do want the record to be clear.

THE COURT: All right.

MR. BOURGEOIS: Another basis and a very strong basis for our objection to the admissibility of Mr. Saffell's proffered testimony regarding prior bad acts and prior dealings is what I've characterized in our written filings as an eleventh-hour sandbag. Back in April, Mr. Risberg, my predecessor as Mr. Wright's counsel, requested notice from the Government if it intended to offer any such testimony and there was no response to that and we learned at I believe 3:30 in the afternoon on the 6th of August, six days before trial and if you take out the weekend

THE COURT: You mean 6th—

[20] MR. BOURGEOIS: September.

THE COURT: 6th day of September.

MR. BOURGEOIS: Three business days before the commencement of trial I believe that this evidence was going to be proffered. And, Your Honor, I believe that that constitutes unfair surprise and in fact is prejudicial to Mr. Wright because it could and likely would have changed a lot of the way we approached this case including certain dispositive, you know, how

he would have approached the plea negotiations in this case, the way we prepare for this case. It fundamentally changes certain aspects of this case in that it paints, you know, it will paint Mr. Wright in a way that he frankly should not be painted in front of this jury. So I want to supplement or at least underscore what I've supplemented in writing that I believe this constitutes unfair surprise when the Government had every opportunity from April and before of this year to chat with their principal witness, Mr. Saffell, to debrief him, to find out the nature of this relationship and as I understand it, the Government did not bother to meet with Mr. Saffell until the 31st of August of this year and learn this information for the first time and then waited another week—

THE COURT: So your point is is that the Government only had the information a week before it notified you?

MR. BOURGEOIS: The Government only had the information for a week. But I don't believe that exonerates the Government. [21] In fact I think it puts the Government in a worse light because this is obviously their key witness. They had access to him and why they chose not to talk to him beforehand, I'm not going to speculate on. But I do believe it's the Government's job to inquire at least especially when Mr. Risberg puts them on notice in April 2005 that this information if proffered we would like to know about it so we can prepare and make appropriate decisions, tactical and otherwise. So, Your Honor, I do want to supplement the record with that—

THE COURT: On that point, Mr. Bourgeois, certainly to the extent that the Government doesn't have information under a 404(b) notice context until

August 31st, I mean let's face it, there are drug cases in criminal cases all the time where suddenly a witness agrees to cooperate and it's an eleventh-hour situation through nobody's fault. First of all, it just happens and that's not the case here. But you appear to acknowledge that the matter of the notice could not have been provided certainly prior to August 31st because the Government wasn't aware of it either.

MR. BOURGEOIS: Well, Your Honor—

THE COURT: Your point is they should have just interviewed the witness earlier is your point.

MR. BOURGEOIS: Perhaps, I'm not parsing it enough or parsing it too much. The Government is comprised of a number of folks here, one of whom is Mr. Wallner and I submit perhaps [22] because I think Mr. Wallner is an honorable man, that he learned for the first time on the 31st of August. Now Detective Crawley and Officer Smith who set up this operation with Mr. Saffell are also the Government in this case. And at some point, we're going to hear I'm sure in the evidence, but at least common sense tells us that in September 2004 when this alleged crime took place or when this crime allegedly took place, however you want to put it, Mr. Saffell went to these officers and must have told them, hey, I know a guy, are we going to set him up as part of my cooperation and they must have said well, who is this guy, how do you know this guy? So this is not news to the Government. It may have been news to Mr. Wallner on the 31st of August. But common sense tells us that Detective Crawley and Officer Smith and the others involved in this controlled drug operation aimed specifically at a specific individual, James Wright, knew. And if they withheld that information from Mr. Wallner, I understand why Mr. Wallner couldn't

have given notice. I do believe Mr. Wallner was under an obligation upon Mr. Risberg's inquiry in April to ask the question. But apparently, he didn't. But the government agents certainly knew this information.

THE COURT: Where is the prejudice to your client? For example, I don't see any prejudice to your client in terms of plea negotiations. Your client is free at any point in time to conduct plea negotiations. Where is the prejudice to your client if there's information that comes forward on September the 6th in [23] terms of plea negotiations as opposed to August the 6th or July 6the? I mean what is the change in position there that prejudices your client in terms of plea negotiations?

MR. BOURGEOIS: Well, I think in the meantime, he was enhanced.

THE COURT: In terms of the sentencing—

MR. BOURGEOIS: 851. Yes.

THE COURT: In terms of the notice of the sentencing enhancement because he had not yet agreed and so the Government upped the ante a little bit in—

MR. BOURGEOIS: They upped the ante a lot.

THE COURT:—in terms of the sentencing enhancement under 851.

MR. BOURGEOIS: That's correct, Your Honor.

THE COURT: All right. But you certainly aren't alleging any willfulness on the part of the Government then?

MR. BOURGEOIS: I'm not alleging any willfulness on the part of Mr. Wallner—

THE COURT: They should have interviewed Saffell earlier as far as you're concerned and know what he was going to say.

MR. BOURGEOIS: Absolutely and I mean I'm not alleging bad faith on the part of Mr. Wallner. Absolutely not.

THE COURT: I understand.

MR. BOURGEOIS: I can't speak for what information [24] Officer Smith and Detective Crawley may have had and for whatever reasons they chose to share or not share. I don't know the gentlemen. I've never spoken with them. So I can't impute anything to them. But I do suggest that, you know, as you know, I do a lot of civil work where we're used to lots of discovery. But I think when the stakes are high as high as, you know, 20 years of a man's life, the Government is under an obligation to make certain inquiry and to provide certain information.

THE COURT: Where is there prejudice in terms of presentation of the trial?

MR. BOURGEOIS: Well, I think the presentation in terms of, the prejudice in terms of presentation of the trial is simply what we've been discussing generally under 404 analysis.

THE COURT: You've certainly been given opportunity to get information, in fact I want to get into that in terms of cross-examination of Mr. Saffell because you have certain items you want to cross-examine on that you've been able to prepare for. How else would you have been able to better prepare if the Government had determined the scope of Saffell's testimony earlier?

MR. BOURGEOIS: Well, I believe that we would have had the opportunity to prepare cross-examination that allowed us to get further into that. Perhaps, for example, trying to develop information other than through the mouth of Mr. Wright that he didn't know this guy or he had had, he had known him, but never [25] dealt with him and perhaps establishing the whereabouts of these alleged transactions—

THE COURT: But we're not going to have any specifics as to transactions.

MR. BOURGEOIS: I understand that, Your Honor. But for example, that's because Your Honor has limited that.

THE COURT: All right. Well, I'm saying—

MR. BOURGEOIS: Let's say I didn't object. Let's say I wanted Mr. Saffell to come in and sing his heart out and he would get up there and say on July 15, 2004, this man sold me two ounces of cocaine.

THE COURT: I understand.

MR. BOURGEOIS: And I could establish to a fare-the-well that on July 15, 2004, Mr. Wright was in Colorado.

THE COURT: The Court is not going to permit that kind of presentation of evidence by the Government because I'm going to limit it. So to that extent where is the prejudice? I'm not going to permit the Government to have Mr. Saffell testify that on specific dates. It's going to be so limited. So your client really is just going to be faced with the situation of an individual saying on some prior occasions prior to September 14th, they engaged in crack cocaine transactions. So where is the prejudice to your client in terms of attacking his credibility? We're going to get to the

issue of how the scope of your cross-examination. But where are you prejudiced there [26] because you're not going to be required to have to rebut certain specific dates and instances?

MR. BOURGEOIS: Well, the point I'm making, Your Honor, is that with notice and the opportunity to have explored this pretrial, I may have wanted Mr. Saffell to give specifics if I knew that I could demonstrate that those specifics were false because that would have been devastating to Mr. Saffell's credibility. I understand and appreciate the limitation that Your Honor has made and I think in light of the fact that, in light of your decision that at least some of it's coming in, then I want it limited and I'm not going to explore that obviously in cross-examination because I don't want, you know, I'm trying to help this man. I'm not trying to hurt his case further. But the point when you asked me where is the prejudice, it's hard to know because when we get this at the very last second, when there was an inquiry months earlier so that we could prepare an investigation on that particular issue, you know, we might have developed the facts that Mr. Saffell says this happened on this date and we can prove that that was physically impossible, then that becomes a very effective tool in our chest in terms of impeachment of Mr. Saffell. But now we're not going to impeach on that ground because it's too vague and generalized. But, Your Honor, I did want to simply supplement that record and I'll leave it at that.

THE COURT: All right. Thank you. Thank you, [27] Mr. Bourgeois. Mr. Wallner, do you want to just address that on the matter of the notice?

MR. WALLNER: Yes, Your Honor.

THE COURT: Essentially, Mr. Bourgeois is acknowledging that the Government only had the information about the scope of Saffell's testimony for a week prior to notifying the defense. But his point is is that the Government had all kinds of time to determine the scope of his testimony.

MR. WALLNER: Well, I guess I agree in large part with what Mr. Bourgeois is saying and quite frankly, it wasn't the Court so much that was limiting what Mr. Saffell was going to testify to. It was the Government. Basically, I put in my paper tc the Court, although you got it this morning, that there will be three questions that actually deal with this—

THE COURT: Well, obviously, the ultimate disposition is—

MR. WALLNER: Correct, Your Honor.

THE COURT:—what I decide up here, Mr. Wallner.

MR. WALLNER: Correct.

THE COURT: We're laughing again. But I thank the Government for its position. But the last time I checked, the guy in the black robe or the woman in the black robe made those determinations.

MR. WALLNER: I appreciate that, judge. But I never asked to put on additional information that Mr. Bourgeois says [28] has not been provided to him. I've never suggested that and what I will tell the Court is is that the videotape and its transcript evidence these prior dealings. So to the extent that there was no evidence to the defense of these prior dealings, these prior relationship that the Government doesn't even plan to explore, the fact that a prior relationship existed was provided to the defense in a timely fashion when Mr. Bourgeois became counsel. In fact

if my memory serves me correctly, Mr. Bourgeois obtained the videotape from Mr. Risberg who had it prior to even that.

Mr. Risberg—

THE COURT: So your point is is that the videotape itself referenced some of those trans—

MR. WALLNER: It did, Your Honor, and to the extent that the Government is going to explore by asking three questions essentially of Mr. Saffell to say have you dealt with this person in the past and Mr. Saffell is essentially going to say yes, that evidence was provided to the defense through discovery very early in this process. And just to address what Mr. Risberg asked for, he asked for notes, reports or memorandum and I'm not going to get into the semantics of what that actually means because I don't think it's germane to this argument. I just wish to say that those things do not exist. So until I have the opportunity to interview Mr. Saffell when I knew that this case was going to trial which occurred as I indicated in my reports, in my papers to the Court, occurred quite close to when this case was going to [29] begin. That's why, number one, the Government is only seeking to introduce it for the limited purpose for which I have suggested the Government will offer it and, number two, to suggest to the Court that evidence of these prior relationships existed through the discovery that was provided at the outset.

THE COURT: All right. Thank you, Mr. Wallner. I think in terms of [30] the matter of the notice requirements. I'm actually referencing here Federal Courtroom Evidence, Cotchett and particularly Section 404.2.1 of this evidentiary treatise noting the issue of pretrial notice. Indeed in United States v.

Valente in 60 F.3rd 941, a Second Circuit case in 1995, the Government provided accused with adequate notice by giving the accused documents the day the Government received them. Here we have at worst a week before there's notice even under the defense theory and the Government has aptly noted that there is general reference on the tape, the tapes itself to the prior dealings between Wright and Saffell. And in that regard in light of the nature of the charge in Count I of the conspiracy, the Sixth Circuit in the case of United States v. Barnes, 49 F.3rd 1144 even has noted that notice is not required at all if the prior act was intrinsic to the charged offense. I don't know that the act in this matter is intrinsic to the charged offense. But I don't find that there's been any prejudice to the defendant in terms of the manner in which this evidence is going to be presented in terms of any issue of notice and I would note that the matter of notice was adequate, particularly in light of the fact that it's on the transcript anyway and any defense counsel could hear the reference that was being made by Saffell and had access to the tape. And then finally, just on this precise question, I would note that I mentioned the case of United States v. Kennedy cited by the Government dealt with multiple conspiracies. The Fourth Circuit in that case did approve of evidence of criminal conduct involving uncharged individuals which had taken place a year before the charged conspiracy period without even requiring recourse to Rule 404(b) which is essentially my point here is that I don't think we even have to get, I don't have to get to a 404 analysis in light of the charge in Count I on conspiracy. But secondarily, just for the record, the secondary basis would be even under a 404(b) analysis, that evidence would be admissible. So Mr. Saffell can

testify. The transcript can be played. There will be a limiting instruction as I've suggested and Mr. Bourgeois can certainly give my clerk the precise language he would like and I will certainly make sure I follow that carefully consistent with what I've said I'll do on that issue today. Now I think the last evidentiary issue we have is the matter of the transcript. Let me make sure I'm clear on this. Mr. Bourgeois, you have had an opportunity to review the tape and I know you have a dispute about what is actually being said or the language on the transcript. So let me first get to the [31] matter of the tape. Are you satisfied that the tape recording itself has been sufficiently redacted and with preserving your objection as to the testimony of Saffell at all, that the tape itself has been sufficiently redacted, the tape that's going to be played?

MR. BOURGEOIS: Your Honor, I can't say I am because the simple reason is that I have not reviewed the tape in its redacted form. Mr. Wallner informed me this morning he did so redact it and he's going to give me an opportunity to do so this evening. I have some concerns and I don't know whether simply a redaction from the transcript or the redaction also indicates a redaction from the tape. But it appears to me that certain other material was removed in addition to the kinds of conversations relating to prior criminal records and stuff of that nature. For example, it appears at least in one area, the change from the original transcript to the transcript Mr. Wallner provided me this morning did away with some language that although not relating to prior court cases and the like, you know, seem to make reference to some rather ribald conversation relating to proposed activities with some women and I'm referring to page 18 of the new transcript. If I may?

THE COURT: Go right ahead. Just show it. I don't have a copy of the transcript at all.

MR. BOURGEOIS: I understand, Your Honor.

(Counsel conferred off the record.)

[32] THE COURT: Why don't we so we move along here, the fundamental point is this. Mr. Bourgeois, you will have an opportunity to review the tape and I don't know how to address this now other than that I'm trying to first establish that you'll be satisfied. If there are going to be evidentiary issues you want to raise as to the tape itself, I need to address those. Then secondarily, apart from the tape, we need to get to the issue of transcripts. So on the matter of the tape, let's assume that you'll be able to review it and you'll be satisfied that the tape has been sufficiently redacted. Let's address the matter of the transcripts.

MR. WALLNER: I'm sorry, Your Honor.

THE COURT: Yes, Mr. Wallner.

MR. WALLNER: I don't want to speak out of turn. And to the extent if there's an issue with a redaction, I still maintain the original. So if there's an issue that needs to be discussed, we can certainly—

MR. BOURGEOIS: Fix it.

THE COURT: That's fine.

MR. WALLNER:—fix it and find the part that needs to be played.

THE COURT: We can address that tomorrow morning before the jury comes back.

MR. BOURGEOIS: I'll review the tape this evening. I am assuming that there will be no issue. But I

can't stand here [33] without having looked at it and said it's fine.

THE COURT: Okay.

MR. BOURGEOIS: With regard to the transcript, Your Honor, I've reviewed the Government's draft transcript. I was handed this morning a revised transcription in which it's been represented that certain things have been removed that we found objectionable. That appears to have been done. The larger issue though is having compared the transcript or at least the draft transcript with the tape exhaustingly, I do not agree with the accuracy of the transcript. I think in areas it's accurate. In other areas, it misses stuff. I have reviewed the Fourth Circuit and other law and what you announced that you intended to do in chambers. Specifically that you would allow the jury to review the transcript as the tape was being played as an aid to them, but that you would not permit the transcript to go, come in as evidence and would not be permitting the jury to take the transcript with them during their deliberations. Although I wish the transcript would not be used at all, I do understand that you have that discretion and that the Fourth Circuit allows that to happen.

THE COURT: There is no question as to the authenticity of the recordings. Correct?

MR. BOURGEOIS: Well, I think a foundation needs to be laid. The recordings themselves have the wrong date stamp on them. They have the wrong time stamp on them. So I believe I [34] have to preserve that issue. And when Detective Crawley or whoever was in charge of that testifies, we're going to have to establish the authenticity of this tape.

THE COURT: All right. Well, then if there is a challenge to the authenticity of the tape recordings and the Government needs to present sufficient evidence to authenticate the matter of the tape recordings themselves, then there has to be some kind of review by me prior then. I understand your challenge in terms of the accuracy of the transcripts. But again before we get to that question, if you're challenging the authenticity of the tapes, then we have to conduct some type of hearing to establish that the tapes are authentic and then we get to the issue of the transcripts. What is your challenge to the authenticity? If there is a challenge to it, then we have to conduct a hearing out of the presence of the jury for me to determine the authenticity of the tapes.

MR. BOURGEOIS: Well, my challenge to the authenticity is simply you don't see the people with any clarity and what you have just like on a VCR or a videotape of anything, you have a date stamp from when the tape was allegedly taken of January 1, 1993. You have a time stamp that runs obviously during the duration of the tape that begins at 12:47 in the morning. Now the alleged events and the alleged occurrences were September 14, 2004 at 3:50 or something like that in the afternoon. So on the face of these tapes, they appear to relate to a date and time [35] completely different from the charged offense. Now I don't imagine as a evidentiary hurdle competent evidence will be put in that I made the tape, I kept it in my control, you know, there was a mistake and that will probably get over that burden or that hurdle. But I believe as a matter at least of simple voir dire at the outset of this gentleman's testimony which I think he would do any way relating to the tape, I would want to challenge that.

It's obviously impeachment in cross-examination anyway.

THE COURT: Well, how long is the tape, Mr. Wallner?

MR. WALLNER: Two hours, Your Honor.

THE COURT: Well, then it seems to me that the way we're going to have to handle this is we'll start at 9:00 tomorrow morning with the voir dire by Mr. Bourgeois. Detective Crawley is going to authenticate the tape?

MR. WALLNER: Actually, Your Honor, at this point, I don't know who's going to authenticate it—

THE COURT: We'll, you're going to need to establish—

MR. WALLNER: The officer—

THE COURT: Somebody is going to need to authenticate the tape because we're not going to have that be done in the presence of the jury. If per chance, it turns out that the tape is not authentic or I have some concerns about it—

MR. WALLNER: Very well, Your Honor.

THE COURT:—in terms of the discretion of the Court to admit tape recordings and transcripts, the Fourth Circuit has noted that on some occasions, it is appropriate to have an in-camera review by the Court to determine the authenticity. I had not realized that there would be some challenge to the authenticity. So if there's challenge to the authenticity, we do not need to review the entire two-hour tape prior to it being presented to the jury. But the safest process is we'll decide by the end of the day. I don't want to cause too much concern to the deputy courtroom clerk

or the court reporter that we're going to be here at 9:00 in the morning. But we may start at 9:30. But we're going to have to have voir dire of the, whichever law enforcement official is going to authenticate the tape. That voir dire and examination will have to be conducted out of the presence of the jury so that I am satisfied that any tape recordings to be introduced later at trial will be, have been sufficiently authenticated and there will be a proper foundation laid for the tape recordings.

MR. WALLNER: Your Honor, if you give me one second, I'll inquire of Detective Crawley whether that can be done—

THE COURT: Just for the record I've noted that the case of *United States v. Branch*, the Fourth Circuit I think in 1992 addressed the propriety of that process. And so that's the process I'll undertake in the abundance of caution for the proper foundation and authentication of the tapes. And again we will in a minute I guess get to the issue of the transcripts. But go ahead for a minute if you want to talk to Detective Crawley.

[37] (Pause.)

MR. WALLNER: Your Honor, I've just discussed briefly with Detective Crawley and he can authenticate the videotape, too.

THE COURT: All right. We'll just do that tomorrow morning then and we'll have Detective Crawley testify. And Mr. Bourgeois, you'll be given an opportunity to cross-examine and challenge the chain of custody, authenticity, the foundation being laid for the tape recordings themselves. So I think that we're now again—I thought we were going to get there earlier. But that's fine. I think we're to the last

evidentiary issue that I know of before we pick a jury in this case and proceed is the matter of the transcripts. Now transcripts if they are deemed to be accurate, unless there's some major consideration of the accuracy of the transcripts, certainly it can, edited versions of transcripts can be introduced and go into the jury room. But as I, Mr. Bourgeois, as I indicated at the pretrial conference last week, if there is a such a dispute over what is being said and your view is is that it's very garbled and no one can understand what—that's your position. Correct?

MR. BOURGEOIS: It is, Your Honor.

THE COURT: All right. So that you don't believe there's any way you can even make out what's being said and it's so garbled. Then to that extent, the Court will permit the Government to have a transcript and say this is what we contend [38] it says and you can challenge it and essentially say to the jury it's up to you to determine if you think that's what was said. On that issue, I think that, quite frankly, on that precise point again in addressing the matter of the authenticity tomorrow morning, Mr. Wallner, it would be very helpful if I have that transcript because I sense what I may want to do is is to listen, to see part of this videotape. In fact I think the way to save time on this is that—when will the tape be available for the Court to conduct a review of the tape?

MR. WALLNER: I can give the—well, that depends essentially on Mr. Bourgeois. I only have one copy of the redacted tape.

THE COURT: All right. Okay.

MR. WALLNER: I can give the Court my original and the Court can review that.

THE COURT: Why don't we—once Mr. Bourgeois is finished with the transcript—here's the way we're going to do this is we'll have testimony by Detective Crawley tomorrow morning starting at 9:30 on the issue of the authenticity of the tape. And then having done that, we will then play a portion of the tape and let me get a sense of how garbled it is or is not.

Is that all right with you, Mr. Bourgeois?

MR. BOURGEOIS: Yes, Your Honor.

THE COURT: All right. And then I'll be able to make a determination. Quite frankly, if I find it's clear as a bell, [39] then I can listen and look at the transcript. The transcript can be admissible as evidence, Mr. Bourgeois, if it's clear as a bell and there are cases which clearly permit an edited version of the transcript to be admitted into evidence and I think you acknowledge that.

MR. BOURGEOIS: Sure.

THE COURT: Now but the point is I've got to make a determination. If I think it's sufficiently garbled so that it's just a matter of the contention of the Government as to what's being said, then I am not going to permit it to go into the jury and I will just permit the jury to see the Government version of the transcript. For that matter, if you have a version, you can submit this as my version for the defense.

MR. BOURGEOIS: My version would simply say unintelligible.

THE COURT: All right. I understand. And you're free to make that argument. So that's the way that will be handled. And so the record is clear, but if I make a determination that the transcript, that the tape is clearer than perhaps you suggest, then it's

perfectly possible that I will then permit the transcript itself to be introduced into evidence. In either form the jury will see it during the playing of the tape. The question will remain my ruling in terms of whether or not it actually will be admitted into evidence or not and I can't really make that ruling until I see the tape. And that's satisfactory [40] to you?

MR. BOURGEOIS: It's satisfactory with the Fourth Circuit, Your Honor. I don't believe the transcript ought to go in.

THE COURT: All right. But you recognize the Fourth Circuit law permits the transcript to go in?

MR. BOURGEOIS: I do.

THE COURT: All right. And the Fourth Circuit law does permit it to go in. But in the exercise of my discretion, I have to determine if it's capable, if the tape is such that the transcript is, I've got to insure that there's some accuracy of the transcript and so that remains to be seen and I'll have to listen to the tape. So we'll do that at 9:30 tomorrow morning. And Madam Clerk, if you'll remind me to let the jury know that we might start maybe at 10:30, quarter of 11 with them tomorrow as opposed to 10:00?

THE CLERK: Yes.

MR. WALLNER: Your Honor, if I may?

THE COURT: Yes, Mr. Wallner.

MR. WALLNER: You said 9 or 9:30.

THE COURT: 9:30. We'll start at 9:30. All right. Anything further before, any other evidentiary matters, Mr. Bourgeois?

MR. BOURGEOIS: Your Honor, just for purposes of the record, we had a lengthy discussion during the pretrial [41] conference in your chambers regarding a written notice that the defense had provided to the Government and I don't know that it's in the court file itself. But I just want to make the record—

THE COURT: Go right ahead.

MR. BOURGEOIS:—if I understand your ruling. We developed information very late in the game based on news media reports that the Government's principal witnesses, Jeffrey Saffell, was allegedly involved in a rape and murder in 1988 and at least according to the news media reports, was an active participant in the rape and in the murder and the disposal of the young lady's body.

THE COURT: And this was what year?

MR. BOURGEOIS: I believe it was 1988. Now I upon learning this, immediately wrote to Mr. Wallner and brought this to his attention and stated that it would be my intention under Rule 609 to introduce evidence of any criminal conviction resulting from that or a juvenile adjudication under the appropriate subset. I think it's 609(d) for juvenile adjudication because as I understand it, Mr. Saffell was a juvenile at the time. Mr. Wallner promptly followed up and located the detective who investigated that crime and in fact confirmed that Mr. Saffell apparently was present during this crime—

THE COURT: But he wasn't charged or convicted.

MR. BOURGEOIS: But he was neither charged nor [42] convicted nor adjudicated as a juvenile relating to that charge.

THE COURT: So it would not fall under Rule 609 because it's not a conviction of a crime.

MR. BOURGEOIS: That's correct, Your Honor. And if that is accurate, obviously, I have no way—I can check the criminal records, adult criminal records and I will accept Mr. Wallner's representation that there is no juvenile adjudication relating to that event, not having had an opportunity to track down these records themselves in the hall of records because this was a long time ago in Annapolis. So I will based upon what's been represented to me by the Government, I'm satisfied that Rule 609 does not come into play and I understand based upon the lack of a predicate there, that there is no basis for me to be permitted to get into that. Under 404(b), I also argued to the Court that I intended to explore that with Mr. Saffell because his bald denial in light of what I got in the news media, I was not particularly satisfied with. Your Honor indicated that, I guess this was last Wednesday, that you would allow me until today to see if I could develop additional information and evidence.

THE COURT: Yes.

MR. BOURGEOIS: And I've not been able to do so. So I just want to put on the record that this transpired. I understand the Court's ruling that I will not be permitted to raise the subject of Mr. Saffell's alleged involvement in a rape [43] and murder—

THE COURT: In 1988.

MR. BOURGEOIS:—in 1988.

THE COURT: Because it isn't a conviction under Rule 609. So there's no basis for its admissibility under 609. You concur with that?

MR. BOURGEOIS: I concur that there being a representation that I accept that there is no conviction or juvenile adjudication, Rule 609 does not come into play.

THE COURT: All right. Mr. Wallner, have you checked—the Government does this all the time checking criminal records and Officer Crawley, an officer of the Baltimore City Police Department. The person either, Mr. Wright either does or doesn't have a prior conviction for this—

MR. WALLNER: Doesn't have a prior conviction, Your Honor. And I also ran his juvenile record and he has no juvenile adjudication which would seem—because juvenile records are a little difficult read. I see nothing that would indicate that Mr. Saffell—

THE COURT: I said Mr. Wright. I meant Mr. Saffell.

MR. WALLNER: Mr. Saffell was arrested or in any way charged and as Mr. Bourgeois indicated, I did speak with Detective Gary Childs who was a pre-eminent death investigator, who's a Baltimore County detective now, was a Baltimore City homicide investigator, who investigated the homicide and was the [44] primary investigator at the time and he indicated to me that if it was not for Mr. Saffell's coming forward and providing the information, that this crime would have gone unsolved and that Mr. Saffell was neither charged nor implicated in that case.

THE COURT: All right. Now obviously, in terms of Giglio material, you have provided Mr. Bourgeois with any indications of any prior convictions of Mr. Saffell?

MR. WALLNER: I have provided Mr. Bourgeois a copy of his prior criminal record. I've provided Mr. Bourgeois a copy of his plea agreement and an indication that he had violated that agreement. The ramifications for such violation as well as the stetting of a Baltimore County case as a result of his continued cooperation in this matter.

THE COURT: All right. And you're satisfied you have that information, Mr. Bourgeois?

MR. BOURGEOIS: I'm satisfied that I've gotten what I've gotten and it appears to be in order.

THE COURT: All right. Thank you. All right. Anything further before we bring the jury in, Mr. Wallner?

MR. WALLNER: Nothing from the Government, Your Honor.

THE COURT: Mr. Bourgeois?

MR. BOURGEOIS: Two minor things, Your Honor.
THE COURT: All right. Go ahead.

MR. BOURGEOIS: If and perhaps I can defer this comment until tomorrow after we've made the rulings on the audiotape, but [45] I wanted I guess to flag the issue now. If the Government intends to play any of this tape, I want the entire tape played because of a number of reasons. The context of this discussion, the discussions they're going to point to need to be put in their entire context. Secondly, I think it would be misleading and highly prejudicial if the Government were to take an hour and a half tape and point to two 15-second segments. There's a lot of talk and banter on this tape. The talk about women at the motel, there's talk about doing this, doing that, cars, women, drugs, partying, all of this stuff and I

would submit, Your Honor, I think a jury will find that there's a lot of trash talking going on on this tape and it is not necessarily talk of a specific crime to be committed or being committed on a specific date and time.

THE COURT: Is there comment on the—do you want the entire tape played? Is that correct?

MR. BOURGEOIS: That's correct, Your Honor.

THE COURT: And is there comment about other crimes being committed on the tape?

MR. BOURGEOIS: There are a few references to some prior court dates that Mr. Wallner has redacted out. I mean I don't want that stuff in. But I want the non-redacted portions and very little has been redacted as I understand it. But I believe one of the things I want this jury to understand and they can get it in brief snippets, but I think it's overwhelming when [46] you see this whole tape how incredibly poor the quality is, how incredibly ambiguous all of the discussions are to the extent you can make any of it out. And frankly, and it's no surprise to Mr. Wallner, one of the central themes of this defense is how shoddy the police work was in this case including the forensic video audiotape evidence. And if this jury, you know, is going to rely on this stuff, it really needs to understand the nature of the evidence that's being presented against Mr. Wright. And I believe the only fair way to do that is to have them—and look, I'm not willingly jumping through this. The last thing I want to do is upset a jury by having them sit through an hour and a half of garbled terrible tape. But it is the actual nature of this evidence that I think is so important.

THE COURT: Well, I understand your point. I want to make sure we're clear that we're not going to create a problem. You've addressed the earlier issue in terms of your couching the matter of Mr. Saffell's testimony at all as being purely 404(b) and I found that it's not. It's a matter of uncharged conduct relating to the conspiracy count in Count I. But secondarily, even if it's a 404(b) presentation, it still survives a 404(b) analysis. But obviously, we must be careful not to have the entire tape played if it's going to pull out other allegations of misconduct by your client because I'm taking great pains to make sure that that's not the case. But you're satisfied as defense counsel that playing the entire tape doesn't expose your client [47] to that kind of problem?

MR. BOURGEOIS: Well, I'm satisfied that, first of all, again I think as you'll see tomorrow, I think a jury is going to make virtually nothing of this tape other than it's garbled and inaudible. But secondly, I'm satisfied that most of the discussion that's on there that relates to prior bad acts or Mr. Saffell's prior bad acts.

THE COURT: Not Mr. Wright's.

MR. BOURGEOIS: There are some ambiguous discussions that could go either which way and I'm glad I flagged it now because what I want to do again since I'll be reviewing the tape yet again this evening, you know, I perhaps I could make a final decision on that request. But as things stand now, I believe it would be appropriate for the whole tape minus the minor—

THE COURT: All right. Mr. Wallner, what's the position of the Government on this?

MR. WALLNER: Well, Your Honor, I don't want to have defense counsel dictate to me the way I'm going to prosecute this case and as Mr. Bourgeois aptly points out, I don't want to be perceived as the bad guy and making the jury listen to two hours—

THE COURT: Well, I'll tell the jury that I've decided that they'll listen to the entire tape.

MR. WALLNER: Well, I agree, Your Honor. But my point was to play the aspects of the tape so they can focus on the [48] particular aspects—

THE COURT: I understand. Other than that, the Government has no objection to playing a longer portion of the tape other than its concern with boring the jury. Correct?

MR. WALLNER: Absolutely, Your Honor.

THE COURT: All right. Well, then that's—Mr. Bourgeois, you can indicate—it's not a matter of Mr. Bourgeois dictating your trial strategy, Mr. Wallner. It's a matter of the Court determining in terms of balancing the presentation of the evidence. To the extent that I'm permitting this evidence to come in, if Mr. Bourgeois desires that another hour of tape be played so that it's the entire context, that's certainly, it's a matter that he can raise for his client and that will be done. We're not going to deny that just on the basis of convenience to the Government and certainly, I'm going to make sure and you remind me, Mr. Wallner. I'll make sure the jury understands that it's my determination that they're going to have to listen to the entire tape and that they shouldn't hold it against the lawyers in terms of the presentation of evidence and sometimes things go longer than perhaps they want. But I've decided they need to listen

to the entire tape recording and I'll couch it in that fashion. So they're not going to hold it against you.

MR. WALLNER: But it's more than convenience, Your Honor, because as Mr. Bourgeois points out, the tape is garbled [49] in parts. There are lengthy conversations involving things that are completely unrelated to drug trafficking. So my concern is and I think aptly from the defense point of view, their desire is to water down the aspects that the Government wants to point out—

THE COURT: And from the point of view of the defense, their view is that you're highlighting certain portions and in terms of a balanced presentation of evidence and in terms of permitting Mr. Bourgeois some latitude, he's not going to be permitted to cross-examine Mr. Saffell on these alleged events in 1988 because no conviction resulted, but to the extent that he wants to try to attack Mr. Saffell's credibility in terms of the context of the entire tape, fairness dictates that he be permitted to do so. So I'll permit the entire playing of the tape and it's going to be about an hour and a half or two hours. Is that correct?

MR. WALLNER: With the redactions, Your Honor, I would say and, quite frankly, there's about a 15 or 20-minute tail of the tape which is actually Mr. Saffell returning to his control agent and the frisking of Mr. Saffell, which I think you can see in some points of the video. So there's additional time on the back end.

THE COURT: We can speed that up. We're not going to have twenty minutes of someone sitting in a car driving.

MR. WALLNER: Well, there's a lot of that, Your Honor. [50] That's what I'm saying.

THE COURT: Yeah.

MR. BOURGEOIS: This is news to me. I've never gotten the tail end of this tape and I would like to see it.

THE COURT: Well, you can look at it. The bottom line is you can look at the tape at the end of the day and, Mr. Bourgeois, I'll make sure we have the entire context of the tape. But—

MR. BOURGEOIS: Thank you, Your Honor.

THE COURT:—I can assure you that to the extent we have 20 minutes of dead time, I'm going to politely tell them to speed the tape up and the jury is going to appreciate it, but you'll be able to have the entire context played so that you can explore cross-examination of Mr. Saffell.

MR. BOURGEOIS: I appreciate it, Your Honor. And one last point on that.

THE COURT: Okay.

MR. BOURGEOIS: I think you said it to Mr. Wallner, but I do want to reiterate. I think it's a very appropriate way to handle it for you to say the Court has determined so that I'm not punished, nor is Mr. Saffell punished—

THE COURT: You both remind me that—

MR. BOURGEOIS:—Mr. Wallner punished by the jury. I apologize, Jim.

THE COURT: I have no problem. I'll make sure I place [51] it in context that I'm requiring the entire

tape be played to prove the entire context. Anything further, Mr. Bourgeois?

MR. BOURGEOIS: The very last thing is that at lunch time, Mr. Wallner is going to provide me with an audiotape of the body wire and that may raise a—who knows what that will raise.

But we may have to address that during a break once I have an opportunity to review that.

THE COURT: The body wire worn by?

MR. BOURGEOIS: Mr. Saffell.

THE COURT: Mr. Saffell.

MR. BOURGEOIS: Apparently, he wore a body wire and we have not gotten that tape.

THE COURT: All right. Where is that tape, Mr. Wallner?

MR. WALLNER: Your Honor, I thought it was in my bag now that he said that. But it must be in my office.

THE COURT: All right. Well, just give him that at lunchtime.

MR. WALLNER: Actually, you know what, they're right here. I knew I had them. As soon as you said it—

THE COURT: All right. Listen to that, Mr. Bourgeois. Do you need some tape recording device here in the courthouse to help you with that, Mr. Bourgeois, or what?

MR. BOURGEOIS: Well, Your Honor, it's my understanding, I think this is right, that they don't intend to [52] offer these. So I can probably listen to these at my office this evening.

THE COURT: That's fine. Okay. Any other evidentiary issues, Mr. Bourgeois?

MR. BOURGEOIS: None that immediately occur to me.

THE COURT: All right. Okay. Are we ready to go over the matter of the proposed voir dire and then the preliminary instruction to the jury?

MR. BOURGEOIS: Yes, Your Honor.

THE COURT: All right. Let's take a look at that now. I think it's incorporated most of the requested questions. Take a few minutes and look—you have copies there. Correct?

MR. BOURGEOIS: Yes, Your Honor.

MR. WALLNER: Yes, Your Honor.

THE COURT: All right. Take a minute and take a look at it.

(Pause.)

THE COURT: From the point of view of the Government, Mr. Wallner, is there anything in terms of the voir dire that you take exception to?

MR. WALLNER: No, Your Honor.

THE COURT: All right. From the point of view of the defense, anything Mr. Bourgeois?

MR. BOURGEOIS: I would simply request two additional questions Your Honor

[53] THE COURT: All right. Which ones are they of your proposed voir dire?

MR. BOURGEOIS: Of my proposed voir dire, it's miscellaneous questions appearing on page 8.

THE COURT: All right. Hold on.

MR. BOURGEOIS: Questions 12 and 14, Your Honor.

THE COURT: All right. Questions 12 and 14. That's the only exception you take to the voir dire?

MR. BOURGEOIS: Those two are the only—those two requested additional are the only problem I have with the—

THE COURT: And those are as follows. You requested a question to the jury, is there any member of the jury panel who would give more weight to the argument of the Assistant United States Attorney than to the defense attorney merely because the former bears the title of Assistant United States Attorney. And I think that the context of that question, I think the context of that question has been covered in my questions 17 and 18. My question 17 of the Court's question is do you have any fixed opinions about prosecutors or law enforcement agents that would prevent you from rendering a fair and impartial verdict in this case. And then 18, would you tend to give greater or lesser weight to the testimony of a law enforcement officer simply because he or she is a law enforcement officer. I think that context is covered because the flip of your question number 12 could be is there any member of the jury panel who would give [54] more weight to the argument of a defense attorney than an Assistant U.S. Attorney merely because he or she is a defense attorney. So it would cut both ways. So I'm not going to ask Number 12. And then Number 14, is there any juror who's concerned that if he or she personally concluded that the prosecution had failed in its burden of proof, but found that a majority of the other jurors held an opposite view, he or she would feel compelled to change his or her verdicts merely because it was a

minority position. And again I think that is covered. I'll just find the general context. I think that's covered. I think that's covered in my Number 20 where I say in every criminal case under our laws, an accused person is presumed to be innocent unless and until the Government is able to prove him guilty by competent evidence beyond a reasonable doubt. And then I emphasize the burden is always on the prosecution to prove guilt beyond a reasonable doubt. I'm not going to get into that kind of voir dire question because clearly that's part of the instructions at the conclusion of the case in terms of those standing by their convictions. So that will be denied as well, Mr. Bourgeois. Anything further?

MR. BOURGEOIS: No. If you'd just note an exception for the record.

THE COURT: Okay. That's fine. So those two questions that you thought needed to be added, I think really don't balance or clearly cover within the questions submitted proposed on the [55] voir dire.

All right. Now with respect to the preliminary statement or instructions I give the jury once they've been selected, just to give them the context of the case, any objection from the point of view of the Government?

MR. WALLNER: No, Your Honor.

THE COURT: From the defense?

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. So that's the preliminary instruction I'll give. And so I think we are ready now to bring the jury in and proceed with jury selection in this case.

MR. BOURGEOIS: Your Honor, I think—

THE COURT: Yes.

MR. BOURGEOIS:—very quickly, to the extent of my voir dire witness list is included in your voir dire, we probably need to remove several of those names.

THE COURT: All right. Go ahead right now.

MR. BOURGEOIS: My number 19, 20, 21 and—

THE COURT: I've got them listed all here.

MR. BOURGEOIS: I'm sorry. Jean Wantlin, Arnold Orwin—

THE COURT: Well, tell me what number on my list, on my voir dire list.

MR. BOURGEOIS: Oh, I don't think I had them listed in yours, Your Honor.

[56] THE COURT: Okay. Just give me the name of the person.

MR. BOURGEOIS: Jean Wantlin.

THE COURT: Hold on a second. All right. That was my Number 20.

MR. BOURGEOIS: Arnold Orwin.

THE COURT: Arnold Orwin. I'll take him out.

MR. BOURGEOIS: Jorge Galvaye.

THE COURT: Will be deleted.

MR. BOURGEOIS: Arthur Wiggins.

THE COURT: Deleted.

MR. BOURGEOIS: And not that I'm concurring with your earlier ruling, but that's the prior murder, rape folks.

THE COURT: I understand. All right. And there's no reason for the Government to have reference to those obviously.

MR. WALLNER: Absolutely not, Your Honor.

THE COURT: They'll be taken off the list. That leaves 19 people who either will be witnesses or who may be mentioned by witnesses. All right. Anything further, Mr. Bourgeois?

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. Mr. Wallner?

MR. WALLNER: No, Your Honor.

THE COURT: All right. We'll take a I guess a ten-minute recess and I'll come back in when the jury is in the room and we'll proceed.

(Voir dire ensued.)

[57] THE COURT: Ladies and gentlemen, you will be sworn as jurors officially tomorrow morning. I'm going to go over the process now. But let me first excuse the rest of the jury panel. I want to thank all of you, those of you who were not chosen as jurors for your participation this morning. With the exception of perhaps military service, there's just no higher calling that can be asked of American citizens than to serve on juries. We have had visitors to this federal courthouse as well as the federal courthouse in Greenbelt from around the world including at least in this courtroom, lawyers and judges from Russia who want to follow and emulate our jury system. And some of our greatest critics still want to model their judicial systems after our system in terms of our jury system and the jury system in this country is a very basic I think bedrock of our democracy. So I want to thank all of you for performing your duty as citizens

today in participating in the jury selection process and I want to thank you for it. You all are excused. Do they need to go to the fourth floor, Karen, or they can just—

THE CLERK: No.

THE COURT: Ms. Moye says you all may go home. You're excused for the day. No one is going to call your employers and say it's five of 3. And so it's a gorgeous day and you enjoy the rest of the day. So and all those school teachers out there, have a good school year. All the best.

All right. Ladies and gentlemen, let me just sort of [58] tell you how it's going to work for the next few minutes and then you're going to be excused for the day yourselves. You all should definitely be in the jury room by 9:00 tomorrow morning. We're going to try to make sure we get started as promptly thereafter as possible. It might be 9:30 when we start. But in the abundance of caution, try to have your coffee and everything and be ready to go. There's a restaurant downstairs as you've probably noticed and be in the jury room, ready to start a little after 9. We're probably not going to start until 9:30, but make sure you're in the jury room say by quarter after 9. You've got your coffee, you're ready to go here and then we will start promptly at 9:30. You will be sworn by the deputy clerk of the court, Ms. Karen Moye, at that time and then I will give you some preliminary instructions which I give in these kinds of cases just to tell you what the case is about to give you some road map in terms of the case. The case will then start promptly with opening statements tomorrow morning at 9:30 from the lawyers and the presentation of evidence. It's anticipated that the case as I've said will take two days. One or two of you may have had some

work issues you were concerned about. We'll certainly address those. Any of you who have those concerns, you remind Ms. Moye and give her a note. And I will certainly call employers or whatever. I'll do whatever you'd like for me to do to alert your employers to the fact that you're on jury service. So unless there's anything further, counsel, with the jury, the [59] jury can be excused. If you'll just go back in the jury room and wait for Ms. Moye to talk with you and I've got to sit here and handle some other matters. So I'll stay up here on the bench. But we'll see you tomorrow morning and as I say, make sure you're in the jury room a little after 9 and we will start promptly as best we can right at 9:30 with opening statements. So have a nice day.

(Jury excused.)

THE COURT: All right. Counsel, why don't you all just be seated for a minute? Let me just go over the process here now. We will have a hearing on the matter of laying the appropriate foundation and the proper authentication of the tapes in light of the objection noted by the defendant pursuant to Rule 901 of the Federal Rules of Evidence so that I can properly determine whether or not there is a sufficient foundation from which a jury could reasonably find that the evidence being proffered, i.e, the videotape is authentic. I note that there's a T.V. screen up here on the bench for me and I see there's been a T.V. screen brought in and I gather we're ready to proceed now with the testimony of Officer Crawley with respect to authentication. Is that correct, Mr. Wallner?

MR. WALLNER: Yes, Your Honor. I believe there was still some test stuff in the VCR.

THE COURT: All right. Why don't you just pull that out so we can see it? Are you ready to proceed, Mr. Bourgeois?

[60] MR. BOURGEOIS: Yes, Your Honor.

THE COURT: Okay.

MR. WALLNER: Your Honor, the Government would call Detective Duane Crawley.

THE CLERK: I tell you, why don't we—Ms. Moye, I didn't think it was going to take her that long to go in and talk to the jury because quite frankly, we normally swear the jury ahead of time now, but we haven't. So we're shifting gears here a tad. So why don't we go into a, we'll go into a five-minute recess until Ms. Moye gets back here to the courtroom. Is that the proffered transcript, Mr. Wallner?

MR. WALLNER: Yes, Your Honor.

THE COURT: Let me take a look at this before the witness comes up. And this is my copy I can keep up here at the bench?

MR. WALLNER: Yes, Your Honor.

THE COURT: All right. We'll take a five-minute recess and as soon as the clerk comes back in, the witness will be sworn and we'll proceed. Take a five-minute recess.

(Recess.)

THE COURT: Are you ready to proceed now, Mr. Wallner?

MR. WALLNER: Yes, Your Honor.

THE COURT: All right.

MR. WALLNER: Your Honor, The Government will call Detective Duane Crawley.

[61] THE CLERK: Please raise your right hand.

(Witness sworn.)

THE CLERK: Please be seated. Please speak directly into the microphone. State your full name for the record and spell your last name, please.

THE WITNESS: Duane Thomas Crawley. C-R-A-W-L-E-Y.

THE CLERK: Thank you.

MR. WALLNER: I'm just waiting for you, Your Honor. Are you ready?

THE COURT: Yeah. I'm ready. All set.

DIRECT EXAMINATION

BY MR. WALLNER:

Q. Detective Crawley, can you tell the Court what your current assignment is, please?

A. I'm a task force officer with the Drug Enforcement Administration assigned to Group 51, Violent Traffickers Initiative.

Q. Detective Crawley, did you have the opportunity to take part in an investigation of the defendant, James Wright, on September 14th of 2004?

A. Yes.

Q. Could you tell the Court briefly what your responsibilities were during that operation?

A. We were attempting to purchase cocaine from Mr. Wright. We were to maintain surveillance of the confidential source and [62] Mr. Wright throughout and once the investigation was completed, we returned to the office and analyze the evidence.

Q. Detective Crawley, was the vehicle that was provided to the confidential source to purchase the drugs wired with video and/or audio equipment?

A. Yes.

Q. Who was responsible for monitoring the video and audio equipment during the transaction?

A. Sergeant Tom Smith.

Q. On September 14th of 2004, did you have occasion to retrieve any documents or evidence from the covert vehicle?

A. Yes.

Q. What did you retain from the vehicle?

A. I removed the eight millimeter cassette tape from the video recorder inside the vehicle.

Q. The vehicle itself is equipped with a video recorder. Is that correct?

A. Yes, sir.

Q. I'll show you what's been marked as Government's Exhibit 2A for identification purposes. Do you recognize that?

A. Yes.

Q. How do you recognize it?

A. It's a VHS tape. Once after I removed the eight millimeter tape from the vehicle, I maintained custody of it and at a time convenient, I made a copy, transferred a copy from the [63] eight millimeter tape to the VHS tape and submitted the eight millimeter tape into evidence.

Q. Have you had an occasion to view that videotape in its entirety?

A. Yes.

Q. Does it comport to the exact same thing that's on the eight millimeter tape that you took custody of from the covert vehicle?

A. Yes.

MR. WALLNER: Your Honor, if I could play this?

THE COURT: Yes.

(The videotape was played.)

Q. Do you recognize that voice on that videotape?
A. Yes.
Q. Who was that?
A. That's the confidential source.
Q. And his name is?
A. Jeffrey Saffell.
Q. Is that the—

THE COURT: How do you spell that, please?

THE WITNESS: I believe it's S-A-F-F-E-L-L.

Q. The first few frames of the videotape that you were just shown, is that the same first few frames of the videotape that was taken on September the 14th of 2004?
A. Yes.
[64] Q. I'll also show you—

MR. WALLNER: I don't have for evidence purposes actually, Your Honor. You have my evidence copy. But I'll show Detective Crawley my—

THE COURT: Certainly. Thank you, Mr. Wallner.

Q. Detective Crawley, let me show you Government's Exhibit—

MR. WALLNER: I'm sorry. Madam Clerk, what's the number on that?

THE CLERK: Number 3.

Q. Government's Exhibit Number 3 for identification purposes. Do you recognize that?
A. Yes.
Q. What is it?
A. It's a transcript that I prepared.

Q. How did you prepare that transcript, Detective Crawley?

A. I sat down at our office and watched this videotape and just prepared it from there.

Q. How many pages is the videotape—I mean how many pages is the transcript? Excuse me.

A. 23.

Q. And approximately how long is the video?

A. Approximately two hours.

MR. WALLNER: Your Honor, at this point I have nothing further. I'll show the video so you can check versus the [65] transcript. But I don't—

THE COURT: That's fine. Why don't we before we play the tape in terms of checking the transcript, in terms of the matter of any challenges to the proper foundation or proper authentication, Mr. Bourgeois, you're free to cross-examine, sir.

MR. BOURGEOIS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BOURGEOIS:

Q. Detective Crawley, how are you?

A. All right. How you doing, sir?

Q. Doing well. Doing well. Sergeant Tom Smith wired the car. Is that correct?

A. No, sir. The vehicle is already equipped wired.

Q. Do you know who put the recording equipment in the car?

A. No, I don't know. But I know Special Agent Gino Specia, he is our technical equipment special agent that works out of the Baltimore District Office.

Q. Okay. And that person installed the video in the equipment?

A. I don't know for sure. The equipment was already installed in the vehicle prior to my arrival.

Q. Okay. Do you know who maintained that equipment?

A. I would say Special Agent Specia.

Q. Do you know or are you just speculating?

A. Well, I know that when we have to, when we go to try to [66] use the vehicle, there's a log book that we have to sign and we get the keys from him to obtain the vehicle.

Q. And on how many occasions prior to September 14, 2004 did you work with that vehicle?

MR. WALLNER: Objection.

THE COURT: Overruled.

A. I would say maybe one time I believe.

Q. And on that one prior occasion, did you have an opportunity to review the videotape that resulted?

A. I believe so.

Q. Was that videotape used in a trial or a court proceeding?

A. No, sir.

Q. Did you happen to notice on that prior occasion whether the recording device left an accurate date stamp on the videotape?

A. No, sir.

Q. Do you recall one way or the other as to whether on that prior occasion there was a date stamp put onto the videotape?

A. No, sir.

Q. You don't recall?

A. No, I do not recall.

Q. Okay. Do you believe that if it had had a date stamp on it that was inaccurate, you would have recalled or said [67] something about that at the time?

A. Yeah. I'm trying to recall to see if we, if I used that vehicle. I know we used it right around that timeframe. I'm not sure if it was before or after. But I know that it was used like right within a week of when we used it that date.

Q. Do you sitting here today have any recollection of ever having noticed that a tape produced from that vehicle other than the tape in this case was stamped with the wrong date stamp?

A. No.

Q. Okay. So you have looked at the videotape made in connection with this case. Correct?

A. Yes.

Q. And is there a date stamp on the videotape?

A. Yes.

Q. All right. And what date is stamped on the videotape in this case?

A. I believe it's January 1st, 1993.

Q. Okay. And when was the first time you noticed that the videotape in this case was stamped January 1, 1993?

A. When I was first making a copy of the tape.

Q. Okay. And it's your contention, of course, that this tape was not made on January 1, 1993. Correct?

A. Correct.

Q. It's your contention that this tape was made on September 14, 2004. Correct?

[68] A. Yes.

Q. And did you bring to anybody's attention the fact that this piece of recording equipment used by law enforcement to create evidence for use in courts yielded a tape with a wrong date stamp on it?

A. No.

Q. Okay. So as far as you know, that recorder is still in place in that vehicle yielding tapes that may have a wrong date stamp on it. Correct?

A. It's possible.

Q. And did you also notice that the tape in this case had a time stamp on it?

A. Yes.

Q. And did you notice at the beginning of the tape at least, the time stamp was approximately 12:15 in the morning?

A. Yes.

Q. Okay. And you are, it's your contention of course that this tape was not made at 12:15 in the morning. Is that correct?

A. No, sir, it was not.

Q. Okay. When was the tape made?

MR. WALLNER: Objection.

THE COURT: Overruled.

A. Roughly like 2:30, 3 p.m. It began in the afternoon—

Q. Okay. Now you testified a few moments ago that the tape that you recovered from this vehicle was an eight millimeter [69] cassette. Correct?

A. Yes, sir.

Q. All right. Do you know who placed that eight millimeter cassette in the vehicle?

A. I did.

Q. Okay. And when did you do that?

A. Right before we turned the vehicle over to the confidential source.

Q. All right. And did you operate that recording device with the tape in it before setting Mr. Saffell up on his operation to insure that the tape was working properly?

A. The only thing I did was turn it on, turn the power switch on and saw that the light showed that it was recording.

Q. All right. Have you had any special training in the equipping of law enforcement vehicles with secret recording devices?

A. In equipping them?

Q. Yes.

A. No, sir.

Q. All right. Have you had any training, sir, in maintaining such recording equipment?

A. No.

Q. Have you had any training in the operation of that equipment other than pushing the on button?

A. Yes.

[70] Q. Okay. What sort of training have you had?

MR. WALLNER: Objection.

THE COURT: Over—actually, that's sustained. This individual's mechanical training has nothing to do with whether or not there's a proper foundation laid or whether or not a jury could reasonably find that this evidence has been authenticated. So that objection is sustained.

MR. BOURGEOIS: Okay. Thank you.

Q. This eight millimeter cassette tape, you also removed it from the vehicle?

A. Yes.

Q. What time of day did you do that?

A. It was roughly I would say approximately 6 p.m. maybe.

Q. And do you have that eight millimeter cassette tape with you today?

A. No, sir.

Q. All right. And the tape that's sitting in that machine over to the judge's right is not in fact the eight millimeter tape that you removed from the vehicle that day. Correct?

A. No, it is not.

Q. All right. When you removed the eight millimeter cassette tape from the vehicle, what did you do with it?

A. I maintained custody of it. I took it back to our office where we have the audio/video set up and made a copy of it, prepared the necessary paperwork to submit to evidence and [71] returned it to evidence.

Q. All right. Well, let's start at 6:00 that evening when you removed the videotape from the car which I think is what you said a moment ago.

A. Yes.

Q. You took it back to your office. Is that correct?

A. Yes.

Q. All right. When you took it out of the car, did you put your initials on it? Did you write on it in any way?

A. No, I didn't put my initials on it.

Q. Did you write anything on it?

A. I may have put the case number on there. I'm not sure.

Q. All right. Well, you may have, you're not sure. Which is it?

A. I'm not sure.

Q. Okay. So you don't know that you in fact put your initials on it. Correct?

A. Correct.

Q. And do you recall having put the date of the tape on the cassette?

A. No.

Q. Okay. And after you took it back to your office, what if anything did you do to that tape to indicate the date and time and case with which it was associated?

A. I just put it into evidence and stored it there until I [72] was able to make a copy of it and then submit it into evidence.

Q. All right. So when you say you put it into evidence, what does that mean?

A. We have a storage, we have a space where we store evidence at our office, nondrug evidence where we could place items in. We have a certain time period to do the necessary paperwork to take it to the evidence custodian and submit it to them.

Q. Okay. So when you take it into the nondrug evidence in your office, I take it that's an area within your office suite at which nondrug evidence is maintained and stored. Correct?

A. Yes.

Q. And that would include, for example, videotapes from drug investigations much like this one. Correct?

A. Yes.

Q. Okay. And that would include audiotapes from other, you know, drug investigations as well. Correct?

A. Yes.

Q. As well as other nondrug evidence. Correct?

A. Yes.

Q. All right. And is that maintained on shelves or in a—

A. In a safe.

Q. In a safe. Okay. And how many tapes were in that safe on the 14th of September, 2004?

[73] A. Just one.

Q. Okay. And which tape was that?

A. The eight millimeter tape from the September 14th incident.

Q. The tape in this case?

A. Yes, sir.

Q. All right. And how was it that you remember sitting here today, roughly a year later, that there was only one tape in that safe?

A. Because we only—the tape would only be in there for a certain number of days. We have to access our group supervisor in order to obtain access to the safe.

Q. Okay. And is there a log maintained of who goes into that safe and who takes stuff out of it?

A. Yes.

Q. All right. And have you reviewed the log?

A. No, I have not.

Q. Who maintains that log?

A. The group supervisor.

Q. Okay. And do you know who has access to that safe besides yourself and the group supervisor?

A. Everyone in the group I would say.

Q. All right. And how many people are in the group?

A. Roughly ten including the administrative assistant.

Q. All right. And how many days did you store that tape [74] in the safe before you retrieved it to make a copy?

A. I'm not sure, sir.

Q. Okay. Well, was it more than a week?

A. No.

Q. Was it more than a day?

A. Yeah. I would say it probably was more than a day.

Q. Do you think it was as much as a week?

A. No, because we're required to have the nondrug evidence turned in within five days.

Q. Okay. So it's fair to say somewhere between one and five days that tape sat in the safe. Correct?

A. Yes.

Q. And you have to forgive me, I'm not in law enforcement, but how many shifts are there at your office where people have, come and go? Is this a 24-hour operation?

A. No, sir.

Q. Okay. So this is normal business hours, roughly 9 to 5?

A. Roughly.

Q. Okay. And so for approximately five days, 9 to 5, there are anywhere from around ten people who had access to that safe. Correct?

A. Yes.

Q. And other than you, there were other personnel conducting drug investigations at that time. Correct?

[75] A. Yes.

Q. Okay. And you can't say sitting here today that there was nobody else who went into that safe and put evidence in or took evidence out during the five days when that tape was in there, can you?

A. No, I cannot.

Q. Okay. And as you said earlier, you're not sure whether you marked that tape in any particular way to indicate that it was the evidence generated in this case. Correct?

A. Correct.

Q. All right. It was just a fairly routine generic eight millimeter tape. Correct?

A. Yes.

Q. Okay. Now after approximately five days, you retrieved that tape from the safe?

A. Yes.

Q. Somewhere in the one-to-five day period to be fair?

A. Yes.

Q. Okay. And then you decided to make a copy?

A. Yes.

Q. All right. And is that the copy is what's resulted from this that, sitting in the tape machine here today?

A. Yes, sir.

Q. Okay. Now you testified in response to Mr. Wallner's question that you recognized the voice on that tape as [76] Mr. Saffell. Correct?

A. Yes, sir.

Q. All right. How many times have you reviewed this tape in the last two weeks?

A. In the last two weeks?

Q. Yes, sir.

A. Twice.

Q. Okay. When did you prepare the transcript of this tape?

A. On Memorial Day.

Q. Okay.

A. I'm sorry. On Labor Day. I'm sorry.

Q. Labor Day?

A. Yes, sir.

Q. There are better ways to spend a Labor Day holiday, but how many hours roughly did it take you to put together this transcript?

A. About eleven hours.

Q. So you spent eleven hours speeding up, slowing down, reviewing the various conversations for the purpose of putting together a transcript. Correct?

A. Yes, sir.

Q. All right. Prior to your having recorded Mr. Saffell's voice on the 14th of September 2004, how many times have you ever spoken with Mr. Saffell?

[77] A. Approximately say maybe three or four times. Five times roughly.

Q. Okay. So other than the evidence that's contained on this actual videotape, had you heard Mr. Saffell's voice randomly? Would you have been able to identify it as Mr. Saffell?

A. Yes.

Q. Okay. And what is it that's so distinctive about Mr. Saffell's voice that would permit you to identify it independently of your knowledge of his voice gained through this videotape?

A. By me talking to him personally.

Q. Three or four occasions?

A. Yes.

Q. Okay. Do you recognize any other voices on that tape?

A. Yes.

Q. All right. And whose voices do you recognize on that tape?

A. James Wright and Dante Couther.

Q. And how did you recognize Mr. James Wright's voice?

A. Well, first, listening to the tape and then speaking to him directly also.

Q. When did you speak directly with Mr. James Wright?

A. After he was placed under arrest and when we arrested him at his Baltimore County Circuit Court case.

[78] Q. And how lengthy was your discussion with Mr. Wright on the occasion of his arrest?

A. Maybe an hour, hour and a half. I'm not really sure.

Q. And do you know where the—I may have asked this—where the eight millimeter tape is today?

A. Yes, sir. It's in evidence at the Baltimore District Office.

Q. And is that the same evidence at Baltimore District Office where the audiotape of what I'll call the setup call was placed?

MR. WALLNER: Objection.

THE COURT: Overruled.

A. I don't believe that that tape was even submitted into evidence, sir.

Q. Okay. Well, what happened to that tape?

MR. WALLNER: Objection.

THE COURT: Overruled.

A. I do not know.

Q. All right. Was it ever in your possession?

MR. WALLNER: Objection.

THE COURT: Overruled.

A. No.

Q. Okay. Well, who recorded the setup call?

MR. WALLNER: Objection.

THE COURT: Overruled.

[79] A. Sergeant Tom Smith.

Q. All right. And did you ever listen to that tape?

MR. WALLNER: Objection.

THE COURT: Overruled.

A. No, I don't believe so.

Q. All right. And did you ever ask Sergeant Smith what happened to the tape?

MR. WALLNER: Objection.

THE COURT: Overruled.

A. Yeah. It came a time where I did ask him about the tape. Yes.

Q. And what did he tell you?

MR. WALLNER: Objection.

THE COURT: Overruled.

A. Once I found out that it was not in evidence, he was checking to make sure he didn't have it in his personal case folder.

Q. All right. And what did he tell you?

MR. WALLNER: Objection.

THE COURT: Overruled.

A. He was unable to locate it.

Q. All right. You say you talked with Mr. Wright for approximately an hour on the date he was arrested. What did you all talk about?

MR. WALLNER: Objection.

[80] THE COURT: Sustained. We're not going to have a pretrial deposition here, Mr. Bourgeois.

MR. BOURGEOIS: Your Honor, what we have is a gentleman who says that he's familiar with my client's voice independent of this tape and I'd like to find out if he interrogated my client frankly.

THE COURT: Well, this is not a pretrial deposition. Now I've given you a great deal of latitude, but it's very obvious to me that you're going to keep asking questions and have a deposition until I cut you off. So I'm cutting you off.

MR. BOURGEOIS: All right.

THE COURT: You please proffer to me how that has to do—he said he talked to your client for an hour in terms of your client's voice to identify the tape

because this hearing is on an authentication of the tape. Tell me how the contents of that one-hour discussion relate to the authenticity of the tape.

MR. BOURGEOIS: Well, I think if this—

THE COURT: How does a one-hour conversation relate to the authenticity of the tape?

MR. BOURGEOIS: It goes to whether this man had a real opportunity to hear this man's voice.

THE COURT: He said he spoke with him for an hour.

MR. BOURGEOIS: Well, I find it hard to imagine in a custodial circumstance where there's been no Miranda waiver that this gentleman actually spent an hour in conversation—

[81] THE COURT: Well, then you can attack his credibility, but you don't need to go into the contents of it. So the objection is sustained.

MR. BOURGEOIS: All right. I have no further questions.

THE COURT: All right. The Court just has a few questions. The eight millimeter tape was placed into the video recorder of the vehicle by you. Is that correct—

THE WITNESS: Yes, sir.

THE COURT:—Detective Crawley? And after the monitored conversation with the confidential informant and Mr. Wright, it was removed by you. Correct?

THE WITNESS: Yes, sir.

THE COURT: And then you took that tape personally yourself and you copied it and transposed it over to a VHS tape. Correct?

THE WITNESS: Yes, sir.

THE COURT: And the VHS tape was then placed in the custody locker and has now been brought in here to court for me to review. Is that correct?

THE WITNESS: Yes, sir.

THE COURT: All right. And you have reviewed both the original eight millimeter tape as well as the VHS and is it the same tape?

THE WITNESS: Yes, sir, it is.

[82] THE COURT: All right. Thank you. As a result of my questioning, anything further from the Government?

MR. WALLNER: No, Your Honor. Thank you.

THE COURT: Mr. Bourgeois, anything further?

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. On that, then why don't you just stay up—well, I guess you can be seated. I guess you can go off the witness stand now on that. Thank you, Detective Crawley. Mr. Bourgeois, in terms of the matter of the proper foundation and authenticity, I'll be glad to hear from you and then we'll go over the matter of the transcript, but I would be glad to hear from you, sir.

MR. BOURGEOIS: Your Honor, I would submit that the principal objection to the authenticity is two-fold. One is the manner in which this tape was stored. I think the detective candidly admitted that it was kept in a common safe to which many, many

people had access for a period of between one to five days, he said at least ten people to go in and out of that locker or safe. That there was no particular identifying marks placed on this tape to differentiate or to specifically identify it with the investigation in this case. And then the prima facie—wrong word. But the tape itself has a date and time stamp of a year and hour far removed from when the tape was allegedly made.

THE COURT: But be that as it may, how does that affect this officer having placed the eight millimeter cassette in the [83] car, then removing it, then looking at the tape and then transposing it over to the VHS tape and then having reviewed both? Whether it has a date of January 1, 1993, September 14, 2004 or January 1, 8006, what difference does it make in terms of his being able to review it and agree that it's got a wrong date on it, but that's the tape that he took out of the car?

MR. BOURGEOIS: Well, Your Honor, I think what he testified to was that he first reviewed the tape when he made the copy between one and five days later. And if he retrieved a tape that was not the tape he put in there, then he would have no reason unless he was sitting there in that car to be able to say that this was or this was not the tape and the quality of this videotape—

THE COURT: But hasn't he testified that he recognizes the voice and based upon working with this confidential informant that he recognizes the voice of Jeffrey Saffell?

MR. BOURGEOIS: He did.

THE COURT: All right. Well, so again, he pulls the tape out. He recognizes the voice of Jeffrey Saffell

apart from his recognition or lack thereof and I understand your argument as to his recognition of your client's voice, he recognizes the voice of Jeffrey Saffell who's working as a confidential informant with respect to this taped transaction.

MR. BOURGEOIS: Well, Your Honor—

THE COURT: So again where is the issue—I mean if [84] there was some ambiguity in his own mind in terms of there being 57 other tapes involving Jeffrey Saffell and other individuals and some ambiguity, I can understand where this argument might hold some water. But I don't understand where we go with that regardless of whether it's in there for a day or five days or ten or twenty police officers have access to it. If he can—he essentially has provided testimony in terms of comparing it and listening to the voice of the confidential informant with whom he was working on this particular monitored transaction.

MR. BOURGEOIS: Well, Your Honor, I think you are correct when you say this is veering now into impeachment on credibility and the like. I think the quality of this tape is such that I find it highly improbable that anybody could say that that is for certain a particular voice. But that's what this detective has said and so I will have to live with that. But as a matter—

THE COURT: Certainly, I'll listen to the tape. If it comes across as if it's in Chinese and it's unintelligible, then that will, certainly a factor I take into consideration. But clearly, you know, the standard here is for me to in terms of the Fourth Circuit standard that has been established, it's for the Court to determine whether or not the proponent has offered sufficient evidence from which a

reasonable jury could determine, could reasonably determine that the evidence has been authenticated. That's the standard. You would agree with that?

[85] MR. BOURGEOIS: Yes, sir.

THE COURT: All right. So that's the basis of it. So whether there's an error on the date or whathaveyou in terms of the fact that it's in the locker, he's testified that it's the only tape in the locker. So anything further, I'll be glad now to listen to the tape and I'll be doing so not only in the context of looking at the transcript, but to see if anyone can reasonably identify a voice of a person with whom they worked.

MR. BOURGEOIS: And there's nothing further on that, Your Honor.

THE COURT: All right. Thank you, Mr. Bourgeois.

MR. WALLNER: Your Honor, I just need the Court's direction. How much of this do you want to listen to? I mean I'll press play and we can go for a while.

THE COURT: How long is the tape to be played in court before the jury? Basically you've redacted it down so it's to be—I'm looking at the transcript here, 22-plus pages. So—

MR. WALLNER: I'm sorry. In light of the Court's ruling this morning, we're going to play the whole thing and I would say it's the better part of two hours.

THE COURT: All right. Now you don't need to play the better part of two hours now. It seems to me we can speed it along. I can try to follow in terms of whether or not this transcript is a reasonable transcription.

MR. WALLNER: I have counter marks throughout mine, [86] Your Honor, and what I'll do is I'll play a couple of minutes and I'll move to a counter mark—

THE COURT: That's fine. And how long should that process take?

MR. WALLNER: I can do it until the Court's satisfied that—

THE COURT: I mean it would be like about a half an hour do you think?

MR. WALLNER: I don't even think it would need to be that long, Your Honor.

THE COURT: That's fine. Try it that way. If Mr. Bourgeois for some reason wants to go back and he can note the counter marks and raise it. I want to see how accurate the transcript is and also the matter of the identification of the voice.

(The videotape was played.)

MR. WALLNER: My marks are by the incorrect date stamp on the tape. So it will take me a minute to—

THE COURT: Go right ahead. Take your time.

MR. WALLNER:—find a different—

THE COURT: It will be helpful if you can alert me to the next page—I've got a feel for the first page of the transcript and I had no difficulty identifying the voice of what's marked as C.S., the confidential source and the transcript certainly appears to be accurate in terms of what's on the first [87] page of this transcript from the Court's point of view listening to the tape. I didn't have any difficulty following it.

MR. WALLNER: Your Honor, I'll pick that up right there. This should be page 2 about two-thirds of the way down. I'm sorry, Your Honor. It's on page 3. I'll back up. That's allegedly Mr. Wright speaking.

THE COURT: All right.

MR. WALLNER: It is three-quarters of the way down. It says Wright. It's a paragraph. THE COURT: All right.

(The videotape was played.)

MR. WALLNER: Your Honor, I'll fast forward a little bit further if you'd like.

THE COURT: That's fine.

MR. WALLNER: 12:27 marks where the defendant identifies himself by name on the telephone call.

THE COURT: What page are you on?

MR. WALLNER: Page 4, Your Honor. It would be again about two-thirds of the way down.

THE COURT: All right.

MR. WALLNER: You see the expletive by the C.S. and then a statement by Mr. Wright.

(The videotape was played.)

MR. WALLNER: Again, Your Honor, I'll fast forward to another mark somewhere throughout this. Sorry, Your Honor. My [88] mark is at 12:39 and we're at 12:33. Halfway down page 6, Your Honor. Your Honor, I'll go to another spot.

(Videotape was played.)

THE COURT: That's fine. You've gone up to page 7 or 8 of the 23 pages so far. So just Mr. Bourgeois can go back to any portions he wants.

MR. BOURGEOIS: I'd like to let him finish.

THE COURT: You go ahead and finish, Mr. Wallner, if you have any other portions you want to show.

(Videotape played.)

THE COURT: I've got enough of a flavor, Mr. Bourgeois. Any portion you want to note for me? I will tell you that it's very clear to me in terms of this transcript. That I've highlighted certain portions in my copy up here. The confidential source on page 3 saying "how much and one-eighth on cost" and the other voice saying "I can get you some soft, probably nine a piece" and then the confidential source saying "how much, one-eighth going to cost me, a whole one eighth hard I'm talking about?" I had no difficulty identifying the voice of the confidential source marked as C.S. So it doesn't appear to me that Detective Crawley would have any difficulty in identifying the voice of the confidential source with which he's working. So that I find that in terms of the proponent of this evidence, the Government has certainly laid a sufficient foundation from which a jury could reasonably conclude that and [89] could reasonably find that the evidence has been authenticated in terms of the confidential source and the voice. So if you want to address that argument first, you can. But he clearly, there's no difficulty at all identifying what the confidential source is saying and his voice and clearly the other comments by your client. I understand your argument in terms of how long Detective Crawley has spoken with your client to be able to identify his voice. But clearly, he can identify the confidential source's voice and based upon his testimony, proper foundation and proper authentication has been laid under Rule 901 of the

Federal Rules of Evidence. So I'll be glad to hear from you on the matter of the accuracy of the transcript if you want to address that or you want to note certain portions of it. Thus far, what I've heard in these various snippets, this transcript to me has been accurate thus far and I haven't—where it said unintelligible, it's unintelligible and where words are printed, I've been able to follow along. But if you want to note other portions of the tape where you believe that something has been typed that is totally unintelligible and there is I guess from your point of view there's been creativity on the part of the Government, you can certainly point that out to me.

MR. BOURGEOIS: Well, principally, Your Honor, I think what you're getting is a few snippets and there are parts of this tape that are more intelligible than others. I think the transcript to the extent that if one were to do a word search on [90] unintelligible, you would find the phrase all through this transcript. But I don't know that it should be placed in front of the jury as evidence. I do not object to the jury following along through the transcript. But I would strongly object especially when you have the amount of unintelligibility that exists here, that I would believe that this transcript would be somewhat misleading in that it's the end all and be all. Some of the jurors may be able to sort out what's being said. Some may not.

THE COURT: Well, clearly, Fourth Circuit law, you would agree that the Fourth Circuit in terms of the guidance it's provided to district judges in the Fourth Circuit, that to the extent in the exercise of my discretion, I decide that the transcript is accurate, then the transcript actually goes in as evidence and goes back in the jury room during deliberations. Correct?

MR. BOURGEOIS: Well, Your Honor—

THE COURT: Unless I have trouble, if I don't believe that it's sufficiently accurate, you certainly are allowed to attack the accuracy of it. But the Fourth Circuit, clearly there's case law which after I conduct this kind of in-camera review, if I make that determination in the exercise of my discretion, clearly, the transcripts can be admissible in evidence and not only reviewed by the jury in the courtroom while they're listening to the tape, but can be taken back into the [91] jury room during their deliberations. Correct?

MR. BOURGEOIS: Your Honor, I agree that there is Fourth Circuit case law that suggests that under certain circumstances a transcript can go in as substantive evidence. If the Court is inclined to do that, I think that it does have to make a full in-camera review of the entire transcript word for word. Now I did not get the opportunity to do that because I got a new transcript this morning and I don't fault anybody for that because it was suggested in chambers that the transcript itself would not be coming into evidence.

THE COURT: Right.

MR. BOURGEOIS: And if the Court is now leaning towards changing its mind in that regard—

THE COURT: I haven't made any formal ruling. I've told you, Mr. Bourgeois, in terms of my general—essentially, the representation you made to me was is that the tape was intelligible and it would be very difficult to follow along with the transcript. And based upon that, my position was that if that's the case and the jury can just look at in the courtroom and then it can be whatever assistance to the jury. I

will tell you I don't find the tape to be unintelligible and those portions in which words have been typed out, I find very clearly I can hear those words being said on the tape. So if that's the case, then the transcript satisfies, you know, having determined that the proper foundation has been laid, then with respect and is [92] properly authenticated under Rule 901, then the inquiry becomes where tapes are lengthy and that clearly, the Fourth Circuit has permitted redaction of tapes and I can also provide a cautionary instruction as the Fourth Circuit has noted in terms of providing a cautionary instruction to the jury that if they believe they hear something different on the tape, then that's fine. And you certainly can attack the accuracy of the transcript. But the precise question of the admissibility of the transcript is, the fact that I'm conducting this pretrial hearing to look into the not only the matter of the foundation having been laid for authentication of the tape, but the accuracy of the transcript. If I determine that the transcript appears to be accurate, then the exercise of my discretion, if I find it benefits the jury, then I will have it go into the jury room. Now if you want to alert me to certain portions of the tape now that you think where there is a paragraph that's noted here where it's clearly typed out and it appears to be a summary of what's being said and you say it's absolutely inaccurate, show me that if you would and then I'll be glad to see—for example, the top of page 10, the top of page 10, there's a lengthy comment on the transcript by the confidential source that starts out with "check this out, make this work with him." And then there's a very short comment by your client in terms of who number is this. Now, for example, if you believe that the tape is unintelligible and there's no basis for that

kind of summary, you can alert me to that and I'll [93] be glad to look at it. Can you find that for me, Mr. Wallner? Is that possible?

MR. WALLNER: I do, Your Honor. I have a counter mark just beyond it, but I should—

THE COURT: Why don't you try to get back on that and that is an example, Mr. Bourgeois. That's a lengthy comment and if it appears that it's being, if there's a certain amount of creativity on the part of the Government of setting, of this quote when in fact it can't be heard, I'll be glad to listen to that. But that's the task at hand here and thus far, the transcript appears to be very accurate to me. I mean I haven't had any difficulty—I mean obviously there's a certain amount of street jive going on, but I can understand what the words are that are being said.

MR. BOURGEOIS: With respect, Your Honor, you've listened to all of maybe two minutes of an—

THE COURT: I know.

MR. BOURGEOIS:—hour and 45-minute tape.

THE COURT: I know. Well, my point is that I'm offering—here's the point. You are certainly free to alert me to portions of the tape where you think it's completely inaccurate and if that's the case, I want to see it.

MR. BOURGEOIS: Your Honor, I would like the opportunity then to do so over night.

THE COURT: All right. That's fine.

[94] MR. BOURGEOIS: The original plan was we were going to do this in the morning to speed things along. Now the game seems to have shifted here.

THE COURT: No game is being—Mr. Bourgeois, with all due respect, sir, that's just totally unwarranted and the record should reflect, no game is being played on you here.

MR. BOURGEOIS: No, no. I didn't—

THE COURT: You are getting more than sufficient opportunity on this. What I'm trying to say is is that in terms of whether or not the transcripts themselves become evidence, the inquiry is whether that they are so patently inaccurate—

MR. BOURGEOIS: Understood, Your Honor.

THE COURT:—that it misleads the jury and you certainly can have the evening to do this. I mean I'm more than willing to give you that chance and I will endeavor to listen to the entire tape if necessary because thus far from what I've seen, the transcript is accurate and if it's accurate, then as you concur in terms of Fourth Circuit law, it's of aid to the jury and can become an item in evidence and the jury can take it back into the jury room during deliberations. But obviously, you're free to attack it. Even in closing argument, you can say that you believe it's inaccurate. But why don't you—that would be helpful to me, Mr. Wallner. I know that's a very lengthy quote at the top of page 10.

MR. WALLNER: I'm just trying to find it.

[95] (The videotape was played.)

MR. WALLNER: One of the issues about playing the whole tape, Your Honor, as I point out, there are lengthy pockets of conversation like this that don't exist.

THE COURT: This is unintelligible. I can't hear this.

MR. WALLNER: There's nothing being said.

THE COURT: Right. I understand.

(Videotape was played.)

MR. WALLNER: That was the end of it. It moved on and he said "that's your people, that's your people, yo," and those numbers, that's your people, yo." That was the last part of it.

THE COURT: All right. Clearly, there are portions of the tape that are garbled. But the written portions to me to be accurate because I was able to follow along in certain portions. I was waiting to see how much farther it was going to go. Mr. Bourgeois, I'll certainly give you an opportunity to review the entire tape and note if you would like, note portions of the transcript which has been proffered that you think are clearly inaccurate or somewhat I guess for use of a better word, creative on the part of the Government which you think would cause me to have the Court have difficulty having this actually become an item in evidence and then I'll be able to make a determination tomorrow morning in terms of whether or not—clearly, it's been authenticated and I've so ruled and a proper foundation has been laid and the question is you've not objected to the matter of the [95] jury having the transcript in the courtroom, but have objected to actually the transcript itself becoming an item of evidence and ultimately going in as evidence and going back into the jury room and I'll certainly withhold ruling on that to give you an opportunity to review the tape and if you want to note those portions to me, I have conducted a review here in court at the hearing. So I'm satisfied that the portions of the transcript thus far that I've seen, I've had no difficulty following along. Clearly, there are

long gaps, but the transcript appears to be accurate. Where words can be understood, they are typed down. But I'll give you an opportunity to challenge that before I make a final ruling on that, sir.

MR. BOURGEOIS: Thank you, Your Honor.

THE COURT: All right. Anything further from the point of view of the Government at this hearing on—

MR. WALLNER: Just two questions on the matter of procedure, Your Honor.

THE COURT: Well, let me make sure. Anything further on this particular issue, Mr. Bourgeois?

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. Okay. Mr. Wallner?

MR. WALLNER: The first of which, Your Honor, is that I understand the Court's ruling that we're going to play the entire tape.

THE COURT: Right.

MR. WALLNER: Am I going to be permitted the opportunity to stop the tape at particular points and ask questions as it proceeds or are we going to have to play the tape and then go back—

THE COURT: No, no. The best way—you mean of Agent Crawley?

MR. WALLNER: No.

THE COURT: I'm sorry. Of the witness—

MR. WALLNER: Saffell, Your Honor.

THE COURT: Saffell. No. The best way and the most expeditious way is to conduct your examination of Saffell and then stop the tape and ask questions of Saffell in connection with that portion of the tape and

then Mr. Bourgeois can cross-examine and can also use portions of the tape in the same manner which means that so that Mr. Bourgeois is not required to also be the choreographer as well as asking questions. I would assume Detective Crawley can assist the Court in moving the tape along at certain portions—

MR. WALLNER: Absolutely.

THE COURT:—as Mr. Bourgeois desires. Is that all right with you, Mr. Bourgeois?

MR. BOURGEOIS: It is, Your Honor. There's only a few points that I would ask to have marked and I can discuss with—

THE COURT: That's fine. So I'll make sure the Government is prepared to move that tape to those portions you [98] want to address with Mr. Saffell tomorrow. But that's the best way I think—that would be a much more efficient way of doing it. Do you have any objection to doing it that way, Mr. Bourgeois?

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. That's fine. That's how we'll do it then. So you don't need to go through the whole examination and then play the Whole tape. You can play the tape in connection with Saffell's testimony.

MR. WALLNER: That's what I was hoping, Your Honor.

THE COURT: All right. Sure.

MR. WALLNER: The last issue to address is the redacted tape which I have a copy of. There is a—I will show the Court if the Court wishes to see it and

Mr. Bourgeois where a part was actually edited for content and I'll—so the Court sees what it looks like, I can do that now as well. If you want to hold that until later—

THE COURT: All right. So we're having an entire tape be played.

MR. WALLNER: We would actually have this tape be played.

THE COURT: I'm sorry.

MR. WALLNER: This is a redacted version.

THE COURT: This is the redacted version. I'm sorry. You mean in terms of shortening down this drag time with in the [99] car and whathaveyou.

MR. WALLNER: Well, that's one of the questions that I have.

THE COURT: So the redacted tape is how long?

MR. WALLNER: Well, the redacted tape is no longer—is just about the same length of that with the exception of the snippets which I deem my own self personally would be prejudicial. I immediately took those out. If Mr. Bourgeois finds anything else he finds prejudicial, I'll have that removed—

THE COURT: Well, I think that you all can work that out. You can probably stay in the courtroom here after I adjourn for the day if you want. Madam Clerk, they can stay in the courtroom here and work with this equipment, can they not?

THE CLERK: Sure.

THE COURT: Just do it that way. And if Mr. Bourgeois has any questions about that, he certainly can raise that with the Court.

MR. WALLNER: Very well, Your Honor.

THE COURT: All right. Anything from the point of view of the Government?

MR. WALLNER: Nothing, Your Honor.

THE COURT: From the defense?

MR. BOURGEOIS: Yeah. I guess following up on Mr. Wallner's point, in terms of the order of proof in terms of [99] the tape. Do we anticipate that the tape will be played first in its entirety and then the cross-examination of Mr. Saffell where they can go into the—

THE COURT: What I anticipate is is that Mr. Wallner will put Saffell on the witness stand and conduct his direct examination including portions of the tape to which he wants to make reference as he proceeds through. And then at the conclusion of that, he will be finished both with the tape and with Mr. Saffell's testimony. Correct, Mr. Wallner?

MR. WALLNER: Correct. Well, the issue is, Your Honor, we're going to play the tape in its entirety. Correct?

THE COURT: Yes.

MR. WALLNER: So Mr. Saffell will be on the witness stand as it goes through. I just want the ability to stop and rewind and highlight and ask questions of Mr. Saffell as we—

THE COURT: The tape is two hours long. But to the extent, we're doing this because I understand that's what you desire, Mr. Bourgeois, for your client. But to the extent you don't think it's necessary, you can so note to Mr. Wallner. We can speed this up, whatever fashion you want. But the entire tape is

being played because it's my understanding that's the request on behalf of the defendant.

MR. BOURGEOIS: Correct.

THE COURT: But you can work with Mr. Wallner in that regard and then you conduct your cross-examination with the [100] access to the tape as well and then your rebuttal examination which will clearly be limited to items in cross.

MR. WALLNER: Yes, Your Honor. I understand.

THE COURT: We would still have Mr. Saffell on the witness stand. All right. Then anything further from the point of view of the Government?

MR. WALLNER: No, Your Honor.

THE COURT: Defense?

MR. BOURGEOIS: No.

THE COURT: All right. Then we will have the jury back here in the box, in the jury room, in the jury box in the courtroom ready to start with opening statements tomorrow at 9:30. Well, actually 9:30, I'll give them the preliminary statement as I do—they will be sworn. We'll give them the preliminary statement on the case and then we will have opening statements and proceed with the presentation of evidence. How long do you think your opening statement will be, Mr. Wallner?

MR. WALLNER: Twenty minutes max.

THE COURT: Mr. Bourgeois?

MR. BOURGEOIS: Ten minutes.

THE COURT: Okay. All right. That's fine. And I sense that this case should be, we should be able to

try this case tomorrow and Wednesday. Do you concur with that?

MR. WALLNER: Well, Your Honor, I would hope—I guess the only issue would be how long it takes to play this videotape. [101] I hope I would finish my evidence by close of business tomorrow.

THE COURT: All right. Mr. Bourgeois, do you think it realistic that the case would go to the jury sometime on Wednesday?

MR. BOURGEOIS: I do.

THE COURT: All right. Okay. That's fine. I'm not holding you to it. I'm just trying to get a feel for it for planning purposes. All right. I guess we are finished for the day and we'll stand adjourned.

(Proceedings concluded.)

I, LISA K. BANKINS, certify that the foregoing is a correct transcription from the record of proceedings in the above-entitled matter

/s/ Lisa K. Bankins _____ 9-1-06
Signature of Court Reporter/ Transcriber — Date

/s/ Lisa K. Bankins
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[103] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Criminal No. RDB-05-0078
Baltimore, Maryland
September 12, 2005
9:30 a.m.

UNITED STATES OF AMERICA

v.

JAMES WRIGHT,

Defendant.

TRANSCRIPT OF TRIAL BEFORE THE
HONORABLE RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:

United States Attorney's Office
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For the Defendant:

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Baltimore, Maryland 21201

Proceedings recorded by mechanical stenography, transcript produced by notereading.

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[105] PROCEEDINGS

THE COURT: We're ready to proceed. You all may be seated for a minute. Before we bring in the jury and swear the jury and before we have opening statements, a preliminary matter to address. I have reviewed the transcript of the tape. I've considered the tape. Here is my ruling on how it's going to be handled. The transcripts will not go into evidence. Mr. Bourgeois, you essentially had a motion, an oral motion' in limine with respect to those. Correct?

MR. BOURGEOIS: That's correct, Your Honor.

THE COURT: And your motion will be granted.

MR. BOURGEOIS: Thank you, Your Honor.

THE COURT: The transcripts will be given to the jury for their review as they listen to the tape and they will be advised they can look carefully at the transcripts and they can make notes on their notepads as to the tapes, but they should not make notes on the transcripts because the transcripts will not go back. The tape is of such quality that and I looked through the entire transcript last night, that I don't know that—it's a little confusing at times. I think the transcript is reasonably accurate. Mr. Wallner, the jury will have it. The jury can look at your version of what is said on the tape and they can take very copious notes. They just can't take the transcripts back because the transcripts will not be in evidence. Obviously, the tape itself will be in evidence and the jury can, will have the [106] T.V. monitor during deliberations and they can pop the VHS tape in and listen to the entire tape recording themselves if they so desire. And now with respect to the playing of the tape, we can deal with this later. But maybe we might want to address this now. It seems to me that,

Mr. Wallner, you can fast forward and move to the various portions of the tape which you desire. Mr. Bourgeois, I don't know that there's any need to play the tape A to Z for an entire two hours. There's no prejudice to your client by your being able with the assistance of the case agent to move to whatever portion of the tape you want to highlight or the jury to listen to. But I don't know what the basis would be of the entire tape having to be played because Mr. Wallner as has accurately noted, there are portions of the tape where nothing is happening. Now is that agreeable to you or if you have some other basis for wanting the entire tape to be played, let me know. What is the basis of it?

MR. BOURGEOIS: Well, the basis, Your Honor, I think as you indicated the other day quite accurately in my view is that by allowing the Government to pull just snippets out of this tape, it highlights and I think unfairly highlights certain aspects of the tape of the conversations in the context of an hour and 45 minutes where there's all sorts of trash talk going on and I think the jury should have the entire context of these few snippets and the context in which they occurred so they can more accurately get a sense for how these guys were talking. You [107] know, they were talking trash about cars, about women, about anything you can imagine that two young amped up—

THE COURT: What? Amped up?

MR. BOURGEOIS: Amped up.

THE COURT: Do you want to define what amped up means for me, please?

MR. BOURGEOIS: Well, without accusing anyone of using steroids, it means overly enthusiastic male talk that perhaps none of us—

THE COURT: It's new in the parlance here. Amped up. I'll have to remember that.

MR. BOURGEOIS: Well, you know, that's my job, Your Honor, to bring as much of a viewpoint into this courtroom. I believe that it would make sense for this jury to do that, to be able to see the entire context of this tape and also frankly some of the aspects of the tape that are not intelligible, sort of they come in and out, in and out, that frankly, one could conclude that what may sound guilty if taken in one small sentence or two, may lose some of that sort of more pernicious aspect if it's taken into a larger context in and around the sentences preceding and coming afterwards and I think frankly this jury should get a sense for when and how. And especially, Your Honor, when as Mr. Wallner I think will concede, the alleged agreement or the alleged conversations to get Mr. Couther into this deal and the alleged transaction with the money occurred at [108] the very beginning and yet, and, you know, it's not an hour and a half later until the alleged or about an hour and 15 minutes later until the actual transaction takes place. And so if we pick the very beginning of the tape and the very end of the tape, I think that gives the jury—

THE COURT: Well, exactly how much—I guess the point is is that I don't know that—you certainly—there's a lot of trash talk just on the transcript that I've reviewed.

MR. BOURGEOIS: Sure.

THE COURT: And clearly, there's portions of, you would define it as trash talking. I'm not sure if I use

your phrase, amped up or not, but in terms of trash talking. I don't know that the jury needs to listen to an hour and a half of trash talking as opposed to twenty minutes in terms of the efficient use of court time. You are free to highlight any portions of the tape you want and you certainly can argue to the jury the context of any comments and the amount of trash talking going on and the jury certainly can—if the jury desires during deliberations, the jury can put the tape in and listen to the entire tape. I just don't, I don't know how constructive it is to just to have the tape played for two hours and I'm having a—I don't really see where there's any prejudice to your client in terms of it not being played for two hours. Basically, all you're arguing is that it's easier for you to argue the context if they listen to a tape with trash talking for two hours as opposed to twenty [109] minutes.

MR. BOURGEOIS: No. Your Honor, there's two other points I want to make. One is that 90% of the conversation on that tape consists of one person's voice and that's Jeffrey Saffell. He is the key witness. He's talking about wanting to shoot people. He's talking about slapping women. He's talking about his prior drug dealings and his activities. He has statements where he lives for drugs. He's saying I can't remember stuff. I smoked—

THE COURT: Now your argument is more the impeachment of Mr. Saffell, not just the matter of the evidence against your client. It's the matter of impeaching Mr. Saffell.

MR. BOURGEOIS: Oh, absolutely. And I think this jury needs to know who this guy is and—

THE COURT: On that basis, on that basis, the entire tape will be played and certainly Mr. Wallner is free to highlight any portions he wants and so can you. But we'll just play the entire tape and the way we'll do it is Mr. Saffell will be on the witness stand and after the tape is played, Mr. Wallner can address any questions to Mr. Saffell and then you can do the same on cross-examination.

MR. WALLNER: I'm sorry, Your Honor. It was my understanding yesterday that I could interpose those—

THE COURT: Absolutely.

MR. WALLNER: Okay.

[110] THE COURT: You can interpose the questions. Stop the tape. You can use the tape in examining Mr. Saffell. Mr. Bourgeois doesn't have any objection to that. Mr. Bourgeois can do the same thing.

MR. BOURGEOIS: Very well.

THE COURT: All right. Any other—

MR. WALLNER: I didn't want to play two hours of tape and then ask questions about—

THE COURT: No, no, no, no. You can ask questions of him during the two hours of tape. So presumably when the tape ends, your examination will end—

MR. WALLNER: Right.

THE COURT:—of Mr. Saffell. And then Mr. Bourgeois can cross-examine and can certainly go back to portions of the tape. We're not going to have, Mr. Bourgeois, you play the entire two-hour tape again. But that's fine. Anything further before we bring the jury in and have the jury be sworn?

MR. WALLNER: I don't believe so, Your Honor.

THE COURT: And I'll give them preliminary instructions and then we'll have opening statements. Madam Clerk?

MR. BOURGEOIS: Your Honor, quickly. I'm sorry.

THE COURT: Yes.

MR. BOURGEOIS: Mr. Wallner and I discussed this. And I don't know whether it makes sense to voir dire the jury as to whether they saw this morning's story or whether it would affect [111] them.

THE COURT: We'll address that in a minute.

(Jury present.)

THE COURT: Good morning. We are missing Juror Number 2. Good morning. Ladies and gentlemen, you may be seated. You'll find that—I find this job is very much like when I was in the military, it's hurry up and wait. So I told you all to be here, ready to start at 9:30, but many times preliminary matters can be handled out of the presence of the jury, which actually saves time and we've probably saved some time this morning as a result.

Madam Clerk, if you will swear the jury, please?

THE CLERK: Members of the jury panel selected in the present case, please stand and raise your right hand.

(Jury sworn.)

THE CLERK: Thank you. You may be seated. Jury sworn.

THE COURT: Thank you, ladies and gentlemen. Members of the jury, we're now about to begin the trial of the case about which you heard some detail

during the process of jury selection yesterday. At the close of the evidence in this case, I will thoroughly explain the elements of the charges contained in the indictment. Before the trial begins however, there are certain instructions you should have in order to better understand the case which is to be presented to you. If anything I say at the close of the case differs from anything I say now, what I say at the close of the case controls. As I told you earlier, I told you yesterday, this is a criminal case brought by the United States against the defendant, James Wright. The Government has charged the defendant via an indictment. An indictment is not evidence. It merely describes the charges made against a defendant. The indictment in this case charges Mr. Wright with two separate crimes. Count I charges that Mr. Wright engaged in a conspiracy with other persons to distribute and possess with intent to distribute 50 grams or more of cocaine base commonly called crack cocaine. Count II charges that Mr. Wright and another person possessed with the intent to distribute 50 grams or more of crack cocaine. Mr. Wright has pleaded not guilty and denies these charges. The indictment charges that the offenses were committed on or about September 14, 2004. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged. Count I of the indictment charges the defendant with knowingly, willfully and unlawfully conspiring with another person to distribute and possess with intent to distribute 50 grams or more of a mixture or substance containing a detectible amount of cocaine base, a Schedule II controlled substance.

In order to prove the defendant guilty of Count I, the Government must prove each of the following elements beyond a [113] reasonable doubt. First, that two or more persons entered into the unlawful agreement charged in the indictment on or about September 14, 2004. Second, that the defendant knowingly and willfully became a member of that conspiracy and third, that one of the members of the conspiracy knowingly committed at least one act in Maryland in furtherance of some objective of the conspiracy. Count II of the indictment charges Mr. Wright with knowingly, intentionally and unlawfully possessing with the intent to distribute 50 grams or more of a mixture or substance containing a detectible amount of cocaine base, a Schedule II controlled substance. In order to prove the defendant guilty of Count II, the Government must prove each of the following elements beyond a reasonable doubt. First, that the defendant possessed narcotic drugs, namely cocaine base, crack cocaine. Second, that the defendant knew that he possessed the cocaine base and third, that the defendant intended to distribute the drugs.

You will determine the facts based on the evidence in the case. The evidence consists of the physical exhibits which are admitted into evidence, stipulations between the parties if there are any and primarily testimony. Testimonial evidence comes from the testimony witnesses give here in court. The lawyers' opening and closing statements to be made in a few minutes this morning are not evidence, nor are the instructions I will give you at the end of the trial.

There are two types of evidence. Direct and circumstantial and both are admissible and can be

considered by you. Many people think circumstantial evidence is not as reliable as direct evidence, but that is not necessarily true. You must rely on it just as you must rely on direct evidence. Direct evidence is where a witness tells you that he directly observes something with his senses. The witness has personal firsthand knowledge of the matter about which he is testifying. For example, the witness may testify that he saw that it was raining last night. This is direct evidence that it was in fact raining last night. Circumstantial evidence is evidence which flows from a logical inference from a known observed fact. For example, the witness may say that he did not look outside last night, but he saw somebody who had just been outside, that person had an umbrella and the person and the umbrella were wet. This is circumstantial evidence that it was raining outside. You are free to make such logical inferences in your determination of the facts in this case. That is all there is to circumstantial evidence. You infer on the basis of reason and experience from an established fact the existence or the nonexistence of some other fact. Circumstantial evidence is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence.

The question of how the defendant might be punished in the event and if you find him guilty should be of no concern to [115] you and should not in any sense enter into or influence your thoughts during this trial. The duty of imposing a sentence on the defendant in the event he is convicted of the offenses charged rests exclusively upon the Court. Your function will be to weigh the evidence in the case and to determine whether or not the defendant is guilty beyond a reasonable doubt based solely on the evidence.

Please do not discuss the case among yourselves during the progress of the trial. Do not discuss the evidence or any aspect of the case. Do not speak with any of the witnesses in the case. Do not talk to any other person about the case and do not permit anyone to talk to you about it. This includes the lawyers in the case who are not permitted to speak to you under any circumstances. So that if you see one of the lawyers in the hall, you may say good morning. They can say good morning, but they're not they really permitted to speak with you and they're not being rude by refusing to do so or being somewhat standoffish. This is what their obligation is as officers of the court.

The only time you are permitted to discuss or consider the case is when it is submitted to you for final consideration. That is after all of the witnesses have testified, the lawyers have expressed their views as to what the evidence supports as to a factual finding and I, the Court, have instructed you on the law. It is only when the case is submitted to you for [116] determination and you go into the jury room that you have the right to discuss or consider the evidence and make your fact determination.

If you wish to take notes during the course of the trial, you may do so and I believe Ms. Moye has given you packets. So you have materials there with which to take notes. If you do take notes, do not discuss them or share them with any juror or other person before or during your deliberations. Your notes are to be used solely to assist you and are not to substitute for your recollection of the evidence in the case. The fact that a particular juror has taken notes entitles that juror's views to no greater weight than those of any other juror. At the end of each day, you should

hand your notes to the courtroom clerk who will return them to you the following day.

Good morning, Detective Crawley.

DETECTIVE CRAWLEY: Good morning, sir.

THE COURT: Nice to see you.

You must not be influenced by anything that you may have seen or heard outside the courtroom regarding this case. You are in the best position of anyone to listen to what the witnesses testify to. You are instructed not to read, listen to or watch news media reports concerning the case and I'll talk to you about that in a minute. I don't anticipate any press coverage of this trial necessarily. But sometimes there are articles in the paper generally. There was an article in the paper this morning. I'll just verify no one has really been affected by it on another matter that might have mentioned one of the lawyers in this case.

In this age of the Internet, you are not to do any research of your own on the evidence or on the law. The only evidence you may consider is the evidence that is admitted in this courtroom during the trial. At the end of the case, I will give you the controlling instructions on the law which you are bound to follow when you retire to the jury room to deliberate.

When you do deliberate in this case, you will not receive a copy of the trial transcript in this case. Thus, your recollection of the evidence controls. Ms. Lisa Bankins is the court reporter. She takes down everything that is said, but there is not a transcript to retrieve from her during your deliberations. So your recollections must control in terms of witness testimony. You will, however, have all the exhibits

with you in the jury room. There's going to be a tape that's going to be played on the T.V. screen. You will have a transcript, a proposed transcript prepared by the Government of that tape recording. That transcript will not go back into the jury room with you, but you can take notes on your notepads in terms of what your view is of what you hear on the tape.

You may have some other questions that you are wondering about and I'll try to answer those up front for you. You're not going to be sequestered in a hotel during the trial. [118] You'll be free to go home at the end of each day. We will sit each day from 9:30 until approximately 4:30 with a mid-morning break and a mid-afternoon break. With respect to lunch, there is a small cafe downstairs, although you're certainly free to leave the courthouse if you can make it back within the one hour for lunch.

Now on the matter of press matters, there was not any article about this case in the paper today. There was an article on another matter that mentioned one of the attorneys in the case. Did anybody by any chance happen to see that? All right. The record should indicate no response from the jury. So counsel, is there anything further to address on that as far as—Mr. Wallner, Mr. Bourgeois?

MR. WALLNER: No, Your Honor.

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. Fine. Then that's fine and I think we are now ready to proceed with the Government with opening statement. Mr. Wallner, are you ready, sir?

MR. WALLNER: Yes.

THE COURT: All right. Glad to hear from you.

MR. WALLNER: Ladies and gentlemen, good morning. I see all of you have your notepads out. So I will try and be brief. My name, as the judge indicated to you, is James Wallner. I am a Special Assistant United States Attorney and it is my privilege and my respon[illegible]bility to prosecute the case before you [119] today.

The judge has given you a little snippet of what the evidence will try to show. The judge has indicated to you what the defendant, Mr. Wright, has been charged with and it's my job now to tell you how the Government will go about showing that particular aspect of the case.

On September 14th of 2004, two men entered into a contract. It was a contract, ladies and gentlemen, like any other contract that occurs in and around Baltimore City and throughout this country and in fact throughout the world every single day. So an agreement between two men to provide goods to a third person. The only difference was that agreement was to provide crack cocaine and because it was an agreement to commit a crime, those individuals entered into a conspiracy. Those conspirators, ladies and gentlemen, are the defendant who was seated behind me, an individual by the name of Dante Couther. The person that they were going to supply the drugs to is an individual by the name of Jeffrey Saffell. And they were required to and agreed to provide two onions, two O's, two hard. And as you all look at me with furled brows, after you receive your education here over the next day or so about what those terms mean, you will figure out that that term actually comes to mean this little brown substance contained in this bag. This, ladies and gentlemen, is approximately, in fact it's more than, approximately

50 grams of crack cocaine. This is what it looks [120] like after it's been sitting in Evidence Control for a year. But this is crack cocaine. And this is the drugs that were provided by Mr. Couther at the request of Mr. Wright and given to Mr. Saffell. The terms, ladies and gentlemen, I used, two onions, two hard, two O's, they are street terms to describe the quantity and type of drugs because generally on the street, you don't walk up and say, hey, can you give me two 50 grams of crack cocaine. You don't say that. You say two hard. Hard because it's crack. Two because 50 grams is two ounces of crack cocaine. Two onions, well, "O", onion is an ounce. Two O's. Again two ounces. That's what these individuals are going to talk about and that's what you're going to see somewhat and hear on the videotape of this transaction. And the reason why I say you're going to see and hear that is because Mr. Saffell at the time he asked Mr. Wright to provide him these two ounces, two hard, two O's, was a Government cooperating witness. And on September the 14th of 2004, Mr. Saffell placed the telephone call to Mr. Wright. Those individuals met at the defendant's home and they traveled for a period of time until they met Mr. Couther who ultimately produced this substance.

Mr. Saffell, ladies and gentlemen, as a lot of people who are cooperating witnesses who come before this court and who testify in front of these juries does not come here with clean hands. He is not someone who would be your average dinner guest. Mr. Saffell is a cooperating witness and he's a cooperating [121] witness because he's under what's called a plea agreement. And he's a cooperating witness because he spent the better part of his life engaged in drug transactions, engaging in the buying, processing, cutting up and selling of crack cocaine. Mr. Saffell,

ladies and gentlemen, is a bad guy. And you're going to learn because you're going to meet Mr. Saffell and he's going to get on the witness stand and he's going to tell you about September the 14th of 2004 and he's going to tell you about his transgressions over the better part of his life. And he's going to tell you that he knew Mr. Wright. He's going to tell you that he called Mr. Wright because he knew Mr. Wright to get him what he wanted. He set Mr. Wright up. He knew Mr. Wright could get what he wanted and the Government asked Mr. Saffell to go ahead and do it and he did.

Now, ladies and gentlemen, as I said, Mr. Saffell isn't your average dinner guest. At the time he set this individual up, he was under a cooperation agreement. The problem is he had already violated that cooperation agreement because while he was supposed to be working for the Government, he went out and did all this stuff on his own. He went back to the life of crime because he thought he could get one over. Well, it didn't happen and he will ultimately at the end of this case or at the end of several cases be sentenced and he'll be sentenced in the Circuit Court for Baltimore City under a plea agreement and Mr. Saffell will tell you what he expects to have happen to him as the result [122] of his entering into an agreement, violating that agreement and then continuing to be a confidential source.

Because Mr. Saffell has a track record of, well, not being a very law-abiding, upstanding citizen, the Government, law enforcement did several things to ensure that, number one, they weren't going to get burned, that Mr. Saffell wasn't going to get 50 grams of crack cocaine and walk away or that the $2,000 of government funds that were provided to Mr. Saffell

to purchase these drugs didn't suddenly disappear in some botched or fake robbery or that Mr. Saffell didn't say he got mugged and that mugger actually happened to be a friend and he walked away with the $2,000. So what did they do? They set up what's called surveillance, roving surveillance. So a group of agents on September the 14th of 2004 went out with Mr. Saffell and they staged themselves in particular areas where they could observe what was going on. They would watch Mr. Wright come out of the dwelling at his house, get into the vehicle and then for the next approximately two hours, watch them drive around the different locations until ultimately, Mr. Couther got into the car, then a few minutes later, got out of the car, walked away from the car, came back to the car. They drove away. A few minutes later, both Mr. Wright and Mr. Couther get out of the car and Mr. Saffell, lo and behold, has the 50 grams of crack. So that's what law enforcement did to make sure they didn't get burned.

Additionally, the vehicle that they provided to Mr. Saffell had a videocassette recorder in it, a mini disc recorder in it. And I'm here to tell you that what you're going to see on this videotape is poor. The angle of the videotape makes it very, very difficult to see anything. But you can hear what is actually going on. And a lot of what I said, two onions, two hard, two O's, hard or soft. What are you trying to do? Ready, another street term for crack cocaine. Ready rock. You will hear that transpire as Mr. Saffell asks Mr. Wright to provide him with this 50 grams of crack cocaine.

Now, ladies and gentlemen, again while the video quality as I've indicated is somewhat poor, it is also not rated P.G. It might not even be rated R. The

reality is for two hours, two men engaged in the drug trade, drove around and had conversations about everything from women to cars to drugs. But the language is not Elizabethan English. So when Mr. Saffell gets on the stand, you will be provided a transcript of what is actually being said. And some of those code words that I've described to you, Mr. Saffell will explain what they mean or what he interpreted that conversation to mean to him. Now I apologize in advance because as I indicated, they drove around for approximately two hours and you're going to get the benefit of a two-hour videotape of not very good quality and a poor exchange of conversation between two individuals, but you will get to see it. And you will be able to see the individuals get in and out of the car. You'll be able to hear the conversations that [124] transpire. You will know that before Mr. Saffell got into the car, he was searched by law enforcement. That he had no drugs on him, that they kept him under continuous surveillance and after Mr. Couther and Mr. Wright exited, they produced this 50 grams of crack.

So, ladies and gentlemen, when this case ends, the 50 grams of crack will be for you to consider. You will hear the audio. You will see what you can of the video. You will have received an education in the sale of crack cocaine and, ladies and gentlemen, you will be convinced beyond a reasonable doubt and you will convict Mr. Wright. Thank you very much.

THE COURT: Thank you very much, Mr. Wallner. Mr. Bourgeois?

MR. BOURGEOIS: Thank you, Your Honor.

Good morning. Mr. Wallner told you about the education that you're going to get. Unfortunately, the

education you're going to get is perhaps the education that the law enforcement officers of this case received, but didn't apparently take hold. When law enforcement agencies and our Government acts ineptly, people's lives are at risk. And I'm here to stand up for the life of Mr. Wright here. The evidence in this case is appalling and you will see it and you will hear it. The incompetence is overwhelming. And I'm going to ask you, ladies and gentlemen, when you're making this very critical decision that will affect the life of Mr. Wright to consider this evidence, to consider not [125] the quantity of the evidence, but the quality of the evidence. Beyond a reasonable doubt is the extraordinarily high standard we set the Government when they are going to take away a man's freedom and that requires strong evidence, that requires good evidence. Mr. Saffell. You heard about Mr. Saffell. Mr. Wallner has sort of approached the subject of Mr. Saffell apologetically. You know, he's not a dinner guest. They don't speak Elizabethan English. You will see Mr. Saffell. You will hear from Mr. Saffell and you will also see that Mr. Saffell was not thrust upon the Government where with some sort of distaste, this witness to a crime came forward and they were forced to use Mr. Saffell as a witness in this case.

Now the Government got in bed with Mr. Saffell. Mr. Saffell is as Mr. Wallner accurately described a career criminal. He's a low life. He got arrested, God knows how many times, in Baltimore City and finally, the hammer was going to come down on him. Finally, he was going to have to face the music after a life of crime. So he did what any person does. He did the best he could for himself and he cut a deal with the Government. He was going to cooperate with Baltimore City law enforcement and he promised the

Government in exchange for a light sentence that he was not going to break any more laws and he was going to help set up other people. He promised the Government that he was going to walk straight and only engage in controlled drug transactions under police supervision to set up [126] people. He lied to the Government. What did he do? He instantly supposedly while acting as a government agent, went off on his own and got involved in an ectasy manufacturing ring. He built the lab. He'll tell you that. He got arrested a few months later in Baltimore County. Crack cocaine or cocaine, I can't remember if it was crack cocaine. This is stuff he was doing off the books. He lied to the Government. The Government knows Mr. Saffell is unreliable. He's a liar. And yet, the Government crawled into bed with Mr. Saffell knowing all of that to continue to work with him. And Mr. Saffell is the Government's case. He is the person the Government wants you to rely upon. So I want you to watch Mr. Saffell. I want you to look at him, look him in the eye and you tell me as I suggest that none of us in making a critical life decision would rely on a thing he has to say.

Now the Government, Mr. Wallner, tells you, did not trust Mr. Saffell so they set up spot surveillance and they put a camera in his car. Government ineptitude. We know the resources the Government has, the high technology it uses to track people. You are going to look at this tape and you will be appalled at the ineptitude. We're going to put a man in jail says the Government based on this kind of evidence.

Most of us nowadays have VCR's or at least had VCR's. I guess it's DVD's now. You know the old joke you can never set the time, it always reads 12:00? Well, this tape on here set up [127] by these officers

which you will see has a date stamp on it. It's going to tell you when this alleged transaction took place. It has a time stamp on it. You'll read it right down here. It will tell you when this alleged transaction took place and the day. You look at that evidence. It will tell you January 1, 1993. Well, that's funny. The indictment charges a crime September 14, 2004. You would think highly trained and educated law enforcement officers in setting up a crime, in setting up a controlled transaction, in setting Mr. Saffell out there to create a crime and drawing other people into it and the Government is going to record it because they don't trust Mr. Saffell. You'd figure they'd get their evidence right. They're off by 11 years. Time of day, this tape says 12:47 a.m. in the morning. The alleged crime, 3:30, 3:45 in the afternoon. This is the Government's evidence.

Now I also want you to look at what's on the tape, not just the date stamp and the time stamp. You're going to see very little. Mr. Wallner is absolutely right. The conversation is appalling. Frankly, if I go out with my friends to watch a football game, get away from the kids and the wife, I may say things that I wouldn't want repeated, speak in a vernacular that none of us is comfortable with in a courtroom. I wouldn't speak like this. That's fine. That's what these guys did. You know, two young guys trying to impress each other talking about women, cars, drugs, you name it. Mr. Saffell spends three-quarters of [128] the conversation trying to entice this gentleman into a motel room where Mr. Saffell's got a bunch of women allegedly. The gentleman declines, says he's in a good relationship. He doesn't need to engage in that sort of activity. But what you will not see on this tape, this is a tape designed to set up and capture a drug transaction. I defy anybody to point to anywhere

on this tape where you see that package that Mr. Wallner was throwing around exchange hands. It's not on there. Mr. Wallner talked about this spot surveillance for purposes of insuring that Mr. Saffell didn't pull a fast one on him and maybe they don't trust him, but they're asking you to trust him. They want to make sure that Mr. Saffell didn't stage a robbery so the $2,000 that the Government supplied him didn't disappear. Guess what? The money is gone.

The Government also because they didn't trust Mr. Saffell and because they wanted to create a bullet-proof case, had another conversation that Mr. Wallner didn't tell you about. Allegedly, they set Mr. Wright up by calling him on the telephone before this transaction in the car allegedly took place to say, hey, this is what we want to do and they taped the conversation. That's what they're going to tell you. They lost the tape. So the education we're talking about here, ladies and gentlemen, is not your education. We're all grown ups here. We know that young men act stupid and say unpleasant things or at least they brag and they do their thing. We know that people speak in [129] bravado when they're in close confines with people they want to impress for good reasons or bad. The education we're talking about is all the law enforcement techniques that we expect to be carried out vigilantly so that the Government can create competent evidence if it's going to put somebody away, they're going to put them in a federal prison. When governments are inept, people get hurt, lives are at stake. Mr. Wright's life is in your hands. We're not going to leave it in the hands of the kinds of evidence that you will see. And I trust when you see this evidence, you will conclude not only that the Government hasn't proved its case beyond a reasona-

ble doubt. But that no government agency should come into a court and try to put somebody in jail based on this kind of evidence. Thank you and I appreciate your attention.

THE COURT: Thank you, Mr. Bourgeois. We'll now proceed with the first witness, Mr. Wallner.

MR. WALLNER: Your Honor, the Government will call Detective Thomas Smith.

THE COURT: All right.

THE CLERK: Please raise your right hand.

(Witness sworn.)

THE CLERK: Please be seated. Please speak directly into the microphone. State your full name for the record and spell your last name, please.

THE WITNESS: Thomas Smith. S-M-I-T-H.

[130] THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. WALLNER:

Q Detective Smith, can you tell the ladies and gentlemen of the jury your current assignment with the Baltimore Police Department?

A I'm a sergeant in the Organized Crime Division.

Q And can you tell the ladies and gentlemen of the jury how long you've been with the Baltimore City Police Department?

A Just started my 19th year.

Q And can you tell the ladies and gentlemen of the jury briefly just some of the activities or some of the responsibilities you've had while being a Baltimore City police officer?

A My first five years I spent in patrol. In '92, I went to a flex unit where we worked on low level drug dealers. In '93, I went to the drug unit in the Southeast District, at which time we worked on a little bit higher level dealers on the street. In about '98, I went to C.I.D. drugs. At that time we worked on mid-level and upper level, dealers. In 2000, I worked on several wiretaps which I wrote and assisted in. In 2002, I became a sergeant and I was assigned back to O.C.D., Organized Crime Division, HIDTA team and I'm currently assigned to a Organized Crime Division, major case squad.

Q When you say HIDTA, can you tell the ladies and [131] gentlemen of the jury what that is?

A That's a task force made up of city, county federal agents working together to work on high level drug dealers in the State of Maryland.

Q And drawing your attention to September the 14 of 2004, were you working that day?

A Yes, sir, I was.

Q In what capacity as a Baltimore City police officer were you working?

A I was a sergeant at that time.

Q In which unit?

A I was in a HIDTA unit down in 52.

Q Did you have occasion to be involved in an operation regarding the purchase of crack cocaine on that day?

A Yes, sir, I did.

Q Could you explain to the ladies and gentlemen of the jury what if anything you did to begin setting up this incident?

A Well, me and Duane Crawley, Detective Duane Crawley met with a confidential source. At which time, we made a controlled call to James Wright to arrange a purchase of a quantity of crack cocaine.

Q All right. Let's stop. Do you see Detective Crawley in the courtroom?

A Yes, I do.

Q And where is he?

[132] A Sitting at the table over there.

Q Additionally, you said you arranged a controlled call. Can you explain to the ladies and gentlemen of the jury what a controlled call is?

A A controlled call is a call where we essentially monitor the conversation between the CS and the target of the investigation.

Q And what's the purpose of that conversation?

A To arrange to purchase drugs.

Q Did you do that in this case?

A Yes, we did.

Q And when you say controlled, is that tape recorded?

A Yes, it was.

Q Was this call tape recorded?

A Yes, it was.

Q That tape is no longer available. Correct?

A That is correct.

Q Can you explain to the ladies and gentlemen of the jury briefly why that is the case?

A The day that we made this, the very next day after we made this recording and made this particular purchase, I was transferred back to the floor at headquarters at 601 East Fayette Street. So the following day after the buy, I moved from the HIDTA building which is located down in Howard County back to Baltimore City and during the move, I believe that I lost the [133] tape because I'm unable to locate it.

Q You had met Mr. Saffell on other occasions. Is that correct?

A That is correct.

Q And how do you know, Mr. Saffell?

A Mr. Saffell has worked for me as a confidential source for since about 2002.

Q And you indicated you had him make a controlled call. Once that controlled call was placed, what if anything else did you do?

A After the controlled call was placed and we knew that we could purchase the drugs, Saffell was searched by me. He was searched to make sure he had no contraband on him, any money, any CDS, anything that he shouldn't have and he didn't.

Q I'm sorry. You searched him and you found nothing?

A Nothing at all. Nothing at all.

Q Did you provide him any currency to purchase the alleged narcotics?

A After he was searched, he was provided $2,000 of U.S. currency provided by the U.S. Government. He was also provided a kel set.

Q Can you explain to the ladies and gentlemen what a kel set is?

A A kel set is simply a transceiver that we can monitor the conversation between him and the target he's with.

[134] Q When you say monitor, that's realtime monitoring?

A That's realtime monitoring. Yes, sir.

Q Can you explain what it means by realtime monitoring?

A I can hear the conversation as it's being spoke.

Q Is there a reason for that?

A Yeah. Two reasons. This gives us as much control as we can over the situation of the buy and stuff like that, keeps us in control. It also enables us to make sure that the C.S. is in no danger at any time.

Q Did you also outfit him with a vehicle?

A Yes, we did.

Q And was there anything special about the vehicle with regard to electronic equipment?

A D.E.A. provided him a vehicle which was equipped with a video recorder and a kel set inside.

Q You indicated that you placed a controlled call to an individual named Mr. Wright. Do you see Mr. Wright in the courtroom?

A Yes, I do.

Q Would you point to him for me?

A Sitting at the table right there.

MR. WALLNER: For the record, Your Honor, the witness has identified the defendant seated to the right of counsel.

THE COURT: The record will so reflect.

[135] Q You indicated it was for the purchase of a particular amount of crack cocaine. Do you recall how much drugs that Mr. Saffell was supposed to purchase?

A Two ounces.

Q When you say two ounces, how many grams of crack cocaine is that, do you know?

A That would be 56.

Q I ask you then once you provided Mr. Saffell with a kel set recorder, with money and a vehicle, what if anything else did you do?

A Once he was in the vehicle, we followed him over to 2226 East Madison Street, the target location of James Wright.

Q How did you know to proceed to 2226 East Madison?

A We had determined through our investigation that is where James Wright had lived at and Jeffrey Saffell also had stated that he was living at that location.

Q When you drove to that location, were other units also responding to take part in this investigation?

A Yes, sir, they were.

Q Do you have an estimate of how many other vehicles might have been involved?

A At least six.

Q When you drove to the location, who was with you?

A When I drove over there, the entire surveillance team was there. But I followed them over along with Duane Crawley. I was by myself though.

[136] Q In separate vehicles.

A In separate vehicles. Yes.

Q Were you able to communicate effectively with the other agents involved in this surveillance?

A Yes. We used city radios, D.E.A. radios and Nextels.

Q When you say Nextels, you're talking about?

A Phones.

Q Point-to-point communication?

A Point-to-point. Yes, sir.

Q Push to talk?

A Yes.

Q Once you arrived at 2226 East Madison Street, what if anything did you do?

A Once I saw him pull up in front of the Target location, I pulled down the street a little ways, continuing to try to keep an eye on the vehicle and the target location.

Q You indicated that you were in your own vehicle and Mr. Saffell was driving the vehicle that was provided by you?

A Yes.

Q And you then traveled to this location together, but in separate vehicles. Correct?

A That is correct.

Q When you drove past him and Mr. Saffell arrived at 2226 East Madison Street, what if anything did you observe?

A At this point in time, I observed James Wright exit [137] 2226 East Madison Street and enter the target or enter Jeff Saffell's vehicle which was provided by us.

Q When he entered the vehicle, was anybody else in the vehicle with the exception of Mr. Saffell?

A No, there was not.

Q Once Mr. Saffell and Mr. Wright were inside the vehicle, what happened next?

A They drove off and surveillance continued to keep an eye on them as I monitored the kel during the time he was in the vehicle.

Q You said you monitored the kel. What does that mean?

A It means I was listening to the conversation trying to determine where they may be going next and who may be the individual that they're going to get the drugs from.

Q You indicated you observed Mr. Wright. Had you had the opportunity to know what Mr. Wright looked like prior to September the 14th of 2000?

A Yes, sir.

Q How did you do that?

A I had a picture of him.

Q Once you left the area and were monitoring the kel, did you then again have occasion to participate in the surveillance?

A I participated in the surveillance. I pretty much stayed back because I have an antenna on my vehicle trying to monitor the kel. So again I picked up Jeff Saffell once he had [138] completed the transaction and had dropped off James Wright.

Q How did you know that Mr. Saffell had completed the transaction?

A Well, I could hear on the kel set that he had made mention that he had got the drugs and that he had just dropped off James Wright at a particular location and surveillance teams also confirmed it.

Q So and this is through radio communications?

A Yes, sir.

Q So once you learned that Mr. Saffell had completed the aspect of the drug transaction that you required him to do, what if anything happened?

A At that point in time, I followed him to a pre-arranged location, myself and Byron Scott.

Q You said pre-arranged location. What was the purpose of that?

A Well, one is to keep a continual eye on him and for two is to meet up in this location so I can retrieve the drugs and again search him and debrief him.

Q You indicated when Mr. Saffell got into the vehicle, you searched him. Is that correct?

A That is correct.

[139] Q And you found that he had no drugs on him. Is that correct?

A That is correct.

Q Did you also search the vehicle to make sure that didn't have drugs in it?

A The vehicle was searched, but not by me.

Q Did it have drugs in it that you are aware of?

MR. BOURGEOIS: Objection.

A No, it had not.

THE COURT: Well, lay a foundation. Was this officer present when the vehicle was searched?

Q Were you present when the vehicle was searched?

A No. I was not.

THE COURT: All right. Objection sustained.

MR. BOURGEOIS: Move to strike the answer, Your Honor.

THE COURT: It will be stricken.

Q Once you then responded to meet Mr. Saffell at this prearranged location, what did you do?

A At that point in time at the pre-arranged location, I met up with Jeff Saffell. He got out of the vehicle. He immediately handed me the two ounces of crack cocaine. At which time once he handed me the crack cocaine, I again searched him and found him to be free of any other contraband or any other drugs or any other money in his possession.

Q And what did you do next?

A At which time Byron Scott stayed with Jeffrey Saffell as I took the vehicle to another location to be searched. At which time I searched the vehicle.

[140] Q I'll show you what's been marked as Government's Exhibit Number 4 for identification purposes. Do you recognize that item?

A Yes, sir, I do.

Q What is it?

A This is the 56 grams of crack cocaine purchased through Jeffrey Saffell from James Wright.

Q How do you know that's the same 50-plus grams of crack cocaine that was purchased by Mr. Saffell on September 14th of 2004?

A The case number that is listed under here at GC-04-0279 was the case number that we used for the James Wright case and it also has an exhibit number which is Exhibit Number 1, which is in the case is the drugs we purchased on that day.

Q Does your signature or name appear anywhere on that item?

A Yes, it does. It says witnessed by TFO Thomas Smith, which is me.

Q When you say witnessed by, you witnessed what?

A I witnessed the sealing of these drugs into this bag by Duane Crawley.

Q When you say Detective Crawley, seated to my left. Is that correct?

A Yes. That is correct. Yes, sir.

Q When you say witnessed the sealing of, what exactly do [141] you mean?

A Once we had the drugs in our hand, we then processed the drugs to be analyzed by Mid-Atlantic. So what happens is we take the drugs, we put them into a plastic bag, we seal it, we put a piece of paper on it, we initial it saying that it has been sealed and we submit it to Mid-Atlantic Laboratories for analyst.

Q When you say Mid-Atlantic Laboratories, what are you talking about?

A That is the agency that analyzes the drugs for D.E.A.

Q Did you do that in this particular case?

A Yes, sir.

MR. WALLNER: Your Honor, I'd move Government's Exhibit Number 4 into evidence, please.

MR. BOURGEOIS: May I just see the bag for a moment, Your Honor?

THE COURT: Certainly.

(Pause.)

MR. BOURGEOIS: No objection.

THE COURT: It will be so admitted. Government's Exhibit 4 into evidence.

MR. WALLNER: Your Honor, if I could have the witness publish it? I don't anticipate to ask any questions, but I'll just publish it quickly to the jury.

THE COURT: Yes. Go right ahead.

Q Detective Smith, if you could step off the witness [142] stand, please? Bring Exhibit Number 4. Starting with these two jurors, if you could show them the substance? And move down to the next four, please. The next four. And finally, the last four. Detective Smith, as you return to the witness stand, you're indicating where your name and information is on that, that is on that label on the bag. Is that correct?

A That is correct, sir.

MR. WALLNER: I have nothing further, Your Honor.

THE COURT: Mr. Bourgeois, cross-examination, sir.

MR. BOURGEOIS: Thank you.

CROSS-EXAMINATION

BY MR. BURGEOIS:

Q Officer Smith, how are you this morning?
A I'm doing fine.
Q Glad to hear it. I guess let's work backwards.

MR. BOURGEOIS: May I approach?

THE COURT: Yes.

MR. BOURGEOIS: Thank you.

Q I think you showed the jurors this evidence sticker. Is that correct?

A That is correct, sir.

[143] Q And you were taught as a police officer that it's important to maintain custody of evidence as well as to indicate, you know, to put on tags of this nature. Correct?

A That is correct, sir.

Q And that's to insure that evidence can be tracked from the time it's collected up to the time it's presented to the jury. Correct?

A That is correct.

Q And what we call a chain of custody for—

A Yes.

Q We don't want to be showing this jury two ounces of crack cocaine obtained in another case because that would be misleading. Correct?

A That is correct.

Q So that's why you're trained that it's exceptionally important as a police officer to maintain written evidence attached to exhibits telling when it was collected, where it was collected and its chain of custody. Correct?

A That is correct.

Q And you would say that any competent police officer would know that. Correct?

A Yes, sir.

Q Okay. Now you say you were removed from the HIDTA assignment the day after this operation.

A That is correct, sir.

Q Okay. And in the process of the changeover, you testified that you misplaced the audiotape of the setup telephone call. Is that correct?

A Yes, sir, I did.

[144] Q Okay. Well, after that conversation was recorded, who took custody of that cassette tape?

A That would be me, sir.

Q Did you apply one of those stickers or some other written information on the tape to indicate this chain of custody that we just discussed?

A It wasn't processed as evidence at that time. I just kept it with me at that point in time when we moved out of where we were at.

Q Okay. So you did not mark that tape in any way to indicate when and where and how it was collected?

A It was marked as the date it was recorded and who the conversations were between.

Q Okay. And then what did you do with that tape?

A I kept it with me. I usually keep a briefcase with me and I put it in my briefcase.

Q Is there not an evidence storage, nondrug evidence storage area where you worked at the time?

A At the point in time when we were in the middle of this process, the way D.E.A. works things, they give every item an exhibit number. So long as it's in my possession, there was no problem with following through and put the evidence away into storage because we weren't finished with it at that time.

Q Okay. Well, there was a problem in this case. You lost it.

[145] A Yes, sir, I did.

Q Okay. And that's a pretty key conversation in this case, don't you think?

A Yes, sir, it is.

Q Okay. So you will admit that you misplaced or lost key evidence in this case?

A Yes, sir.

Q And the jury will never have an opportunity then to listen to what happened on that conversation. Correct?

A That is correct, sir.

Q And the only person who can really tell us who participated in that conversation, there's only two people, Mr. Saffell and Mr. Wright. Correct?

A That is correct, sir.

Q And you would agree that Mr. Saffell is not the most reliable person on this planet?

MR. WALLNER: Objection.

THE COURT: Sustained.

Q Would you agree with me that Mr. Saffell is not a reliable person?

MR. WALLNER: Objection.

THE COURT: Sustained.

Q All right. You have worked with Mr. Saffell as a confidential source since 2002. Is that correct?

A That is correct.

[146] Q Okay. And you understand that Mr. Saffell entered into a plea agreement at some point when he got arrested in Baltimore City?

A Yes, sir, he did.

Q Okay. And have you ever seen that plea agreement?

A Yes, sir, I did.

Q Okay. And that plea agreement was dated June 10, 2003. Is that correct?

A That is correct.

Q Okay. So he got arrested at some point between the time he started working with you in 2002 and the time he entered into his plea agreement in June 2003. Is that correct?

A Yes, sir.

Q Okay. So while he was working with you as a government agent to cooperate on cases, he went off and got himself arrested doing his own thing. Correct?

A That is correct, sir.

Q And he was facing some pretty significant time as a result of that arrest. Correct?

A Yes, sir.

Q And in fact, when you learned that he had been arrested, did you feel that he had misled you?

A Had misled me? No. I just believed at this point in time what we would call he was double dipping. He was working for us and also working for himself.

[147] Q Okay. And that was okay with you. It's—

A No, sir. It's not okay with us. But I had no knowledge of what he's doing on his own. I only had knowledge of what he's doing when he's in the presence of myself.

Q All right. Well, you explained to him when you started working with him in 2002 that if he was going to work with you as a government agent, as an informant that it was very important that he not double dip. Correct?

A That is correct. There is actually paperwork that he signs that indicates that he's not to participate in any type of drug activity at all.

Q And in fact, that's a contract of sorts, isn't it?

A I guess it's a contract. Yes.

Q He promises not to engage in illegal activity and to cooperate with the Government and the Government will then promise to perhaps lighten his sentence or at least advocate for a lighter sentence. Is that correct?

A It depends on each situation.

Q Okay. In any event between when he, between the time when he first started working with you in 2002 and the date of his plea agreement in June 2003, he apparently lied to you. He started double dipping. Correct?

MR. WALLNER: Objection.

THE COURT: Overruled.

A I don't believe he lied to me. He was just doing [148] something on his own. If I was aware that he was doing this, then I would have confronted him with that information at that time.

Q He broke his promise to you, the promise that he would not break any laws and he would only work, not double dip and vice versa. You guys would work on his behalf.

A He signs the paperwork stating that he would work with us and he was indicating that he would not deal drugs. Yes.

Q Okay. And he broke that promise?

A He broke that agreement.

Q Okay. Now on June 10th, he signed another plea agreement. Correct? June 10, 2003.

A Before June 10th, there wasn't a plea agreement.

Q Okay.

A But at June 10th, yes, he did sign—

Q June 10th, he signed a plea agreement. Correct? And then you learned later or he agreed in that plea agreement that he was not going to double dip or break the law. Correct?

A That is correct.

Q And down the road if he cooperated, the Government may make some effort on his behalf to lower a sentence he was facing. Correct?

A During that plea agreement, he was given a particular sentence that he would get if he cooperated with law enforcement doing particular investigations.

[149] Q And he broke that promise also?

A That is correct.

Q That's right. You learned he immediately, maybe even beforehand got involved in a drug manufacturing lab?

A That is correct.

Q Manufacturing ectasy. Correct?

A Yes, sir.

Q And the intent was to sell that on the street, tens of thousands of pills on the streets of Baltimore?

A Yes, sir.

Q At about ten to fifteen dollars a pop?

MR. WALLNER: Objection.

THE COURT: Overruled.

A I'm not sure exactly what he was going to make on per pill on that.

Q But you didn't even learn about his drug lab activity until January 2004 when he got arrested by Baltimore County Police. Correct?

A We knew that there was, there was a lab out there prior to his arrest in Baltimore County.

Q Did you know that Mr. Saffell, your agent, was involved in this drug lab manufacturing?

A Yes, sir, we did.

Q Okay. And you continued to work with him anyway?

A No. We weren't working with him at that time. At that [150] point in time, we were working on trying to take the lab out.

Q Okay. And in January 2004, Mr. Saffell was arrested with cocaine in his home. Correct?

A That's what I was told. Yes, sir.

Q Okay. And you learned that. Correct?

A Yes. That was through information from Baltimore County.

Q Okay. So that was another example of his breaking his promise to the Government. Correct?

MR. WALLNER: Objection.

THE COURT: Overruled.

A He didn't adhere to the contract. Yes.

Q Okay. And based on the fact as you testified now that he didn't adhere to the contract because he got involved in a MDMA ectasy drug manufacturing lab and the fact that he got himself arrested in Baltimore County for possession of cocaine, is it your belief that Mr. Saffell is a reliable person?

MR. WALLNER: Objection.

THE COURT: Sustained. Counsel, approach the bench, please.

(Bench conference:)

THE COURT: Mr. Burgeois, you cannot challenge witnesses. You can bring out all you want. But any request of any witness to give their judgment on credibility or reliability upon another witness would be sustained. It's an inappropriate [151] question to ask any witness, law enforcement or otherwise, to voice their opinion on the credibility of another person who's going to be a witness in the case. That's the reason that the objections have been sustained. There's no reason to go there again.

MR. BOURGEOIS: Yes, Your Honor.

THE COURT: Return to the table.

(In open court:)

Q Now as we've said before, just to wrap this up, there is no tape that this jury is going to hear of the conversation between Mr. Saffell and Mr. Wright because you lost that tape. Correct?

A There's multiple tapes, but the one tape that was the controlled call, we do not have. The other tapes we do have.

Q All right. Well, I'm referring to the controlled call. We'll get to the other stuff later. You lost the only tape of the controlled call. Correct?

A Of the controlled call. Yes, sir.

Q Okay. Now you've told the jury that you searched Mr. Saffell's person on September 14, 2004. Correct?

A That is correct.

Q And that was to make sure that he didn't have any money on his person. Correct?

A Any money or any contraband or any drugs.

Q I'm asking about the money. Right?

[152] A You asked me what I searched him for and I'm just telling you, sir.

Q Okay. What I asked, sir, is you searched him to make sure he didn't have any money on him. Is that correct?

A That is correct. Yes.

Q And you also searched him to make sure that he didn't have any contraband which would mean other things such as drugs. Correct?

A That is correct. Yes, sir.

Q Or weapons?

A Yes, sir.

Q How about drug scales, scales for weighing drug quantities?

A Yes, he did—no, he did not have a scale on him. No.

Q Okay. So when he entered into that car, the D.E.A. provided vehicle on September 14th, he had, you're satisfied, no money on him other than $2,000 in government provided funds. Correct?

A That is correct.

Q Okay. And why is it—well, let's back up. Tell me about the $2,000 in government currency. Why is it that the Government provided him money?

A To make the control purchase of the C.D.S.

Q Now did the Government, did you, I'll just put it that way, did you record in any way what the money consisted of?

[153] A The money is recorded. Yes.

Q Okay. How was it recorded?

A It is typed on a piece of paper.

Q Okay. What is typed on the piece of the paper?

A The serial numbers and the date of the, date on each bill.

Q Okay. And in what form, I mean was it $20 bills or was it hundred-dollar bills? Do you remember?

A Just mainly 20's and 10's.

Q Okay. And have you kept a copy of that of the record by which you recorded those?

A Yes. There should be a copy in the case folder of all the money that was used on that date. Yes.

Q All right. And do you have the case folder with you?

A I do not have it with me, but I believe Detective Crawley does.

MR. BOURGEOIS: Okay. I'd ask—would you mind?

THE COURT: Thank you, Mr. Wallner.

MR. BOURGEOIS: May I approach, Your Honor?

THE COURT: Yeah. Certainly.

MR. BOURGEOIS: Thank you.

Q Sergeant, is this the document you were just talking about?

A Yes, sir, it is.

Q All right. And is that, does your signature appear on [154] that document?

A No, it does not. I did not write this document up.

Q All right. You did not prepare this?

A No, sir, I did not.

Q All right. And so do you have any personal knowledge of the denominations and the quantities of money—we know it's $2,000. But do you know the, any personal knowledge of the quantities, of the way—I'm getting screwed up here—of what bills were provided?

A No, I do not.

Q Okay. Do you know whether a photograph was taken of these bills?

A No, they weren't.

Q Why was a document such as that prepared by Detective Crawley?

A That's D.E.A. policy.

Q All right. And do you know why that policy is in place?

A No, I do not.

Q Do you have an understanding that it's to insure that if the money is recovered at the end of a controlled transaction, the Government will be able to prove that it's the same money that was provided to the government agent?

A That is correct. Yes, sir.

Q And so that's the policy?

[155] A Yes, sir.

Q All right. And you understood that?

A Yeah. You're right.

Q In this case the money was not recovered. Is that correct?

A No. The money was not.

Q Now you say you provided a kel set to Mr. Saffell. That's a body wire in essence—

A Yes, sir, it is.

Q Okay. And the purpose of that was for you to be able to monitor the conversations as they took place. Correct?

A That is correct. Yes.

Q And have you listened to the tape recordings of the kel set transmissions in this case?

A Have I? No. Not since the day that we did the transaction.

Q You never listened to the tape recordings themselves. Is that right?

A I listened to them again. But it's been at least—I haven't had anything really to do with the case since the day I was transferred back to the headquarters.

Q Okay. Well, sitting here roughly a year later, almost exactly a year later—

A Yes, it is.

Q Do you recall when you listened to those tapes for the [156] first time, that there were three tapes?

A Yes. There were three tapes.

Q Okay. And that the recording quality of those three tapes was very poor?

A Yeah. There was interference. I mean going over the air waves and going in the different areas, we still work off of satellites just like phones. So sometimes the conversations go in and out. That's why he was provided a vehicle that also recorded conversation and video.

Q Okay. And so you would agree that the kel set recording sort of fade in and out, there's interference and generally, the quality is very poor?

A Yeah. It has a, it's not as good as the quality from the stuff that we got inside the vehicle. No.

Q Okay. So that the quality of the videotape is much better than the kel set recordings from the body wire. Correct?

A Since the last time I heard it, I would have to agree with that, but I haven't heard the tapes in a while so I cannot totally agree.

Q Okay. But your best recollection—

A My best recollection is yes.

Q Okay. Thank you. Now let's talk about the vehicle. You testified that there was a D.E.A., a vehicle provided to Mr. Saffell. Correct?

A That is correct.

[157] Q And you searched that vehicle before releasing it into Mr. Saffell's custody. Correct?

A It was searched by someone, yes.

Q All right. So you did not personally search it?

A I did not search it.

Q So you don't know one way or the other—

A No, sir, I don't.

Q Okay. Do you know who searched it?

A I really don't know. I don't recall.

Q All right. In any event, that vehicle was equipped with some recording equipment. Correct?

A That is correct. Yes.

Q Where was the equipment placed?

MR. WALLNER: Objection.

THE COURT: Overruled.

MR. BOURGEOIS: Well, I can lay a foundation. I suspect that that's—

THE COURT: Go ahead.

Q Do you know where the equipment was placed, sir?

A This vehicle was equipped by the D.E.A. technicians and they put the stuff inside there. Do I

know where the microphones are and all the little video cameras are? No. I know where some of them are. Yes.

Q Okay. Had you ever worked with that vehicle before?

A That was the first time I used it.

[158] Q All right. And I take it you haven't worked with it since?

A No, I haven't.

Q Okay. Who placed the cassette, tape cassette into the recording device in that car on that day?

A I don't know.

Q And after the operation was concluded, who removed the cassette out?

A I don't know that answer either. I wasn't—I searched the vehicle to make sure there was no other contraband or any money or anything else inside the vehicle at that time. But it was searched by somebody else.

Q I'm sorry. When did you search the vehicle?

A When did I search it? I searched it at the end—

Q At the end of the shift.

A At the end of the shift. Yes.

Q Okay. And you found nothing in it other than Mr. Saffell—

A No.

Q Did you find a drug weighing scale in there?

A I didn't see a scale in there. No.

Q When Mr. Saffell reported to you and was it Officer Scott?

A Byron Scott.

Q Byron Scott after the drug transaction took place, you [159] searched him as well. Correct?

A Searched who?

Q Mr. Saffell.

A Yes. Saffell was the first person I searched once he got out of the vehicle.

Q Did he have any cigarettes on him?

A I would have to say yes.

Q All right. Did he have any cigarettes on him when he got into the car at the beginning of the thing, beginning of the operation?

A No, he did not.

Q Do you know how he got those cigarettes?

A They stopped at a store along the way.

Q Do you know what money was used to buy those cigarettes?

A Well, if it was our money, it would have to be the money that we provided to him to buy the drugs.

Q Okay. So Mr. Saffell was buying cigarettes with government money?

A I would have to say yes.

Q All right. Did he have any sodas on him at the end of the buy?

A There was a soda in there. Yes.

Q Okay. And I ask he didn't have a soda when he went into that car, did he?

[160] A No, he did not.

Q Okay. Did you maintain eyeball contact on Mr. Saffell's car from the time it left, you know, from the time the operation started until the time it ended?

A Someone did have the eyeball on him the entire time. Yes.

Q No. My question is did you maintain eyeball—

A No, sir, I did not.

Q Okay. At what points during the day did you lose contact with that vehicle, a visual contact?

A After the vehicle stopped in front of 2226 East Madison Street and picked up James Wright, my whole job was to monitor the kel. Because I had an antenna on the back of my vehicle and we had

enough vehicles out there to do the absolute surveillance to keep an eye on the target vehicle, I just stayed back until the buy was done and I followed him back to the location.

Q All right. Did you see the vehicle stopped at the Baba Johnny Convenience Store?

MR. WALLNER: Objection.

THE COURT: Sustained.

MR. BOURGEOIS: Okay.

Q You never saw Mr. Saffell exit the car at any point during that day other than at the very end of the—

A That is correct.

Q —operation? Okay.

[161] MR. BOURGEOIS: Bear with me for one minute, Your Honor.

Q You reviewed the videotape, sir?

A I did take a look at the tape, yes.

Q Did you notice the date stamp on the videotape?

A Yeah. '93.

Q January 1, 1993?

A Yes, sir, it is.

Q So that was wrong?

A Yes, sir, it is.

Q That was a mistake?

A Yes, sir.

Q And you note the time stamp on the videotape?

A I believe the time was started around 12:20 if I'm not mistaken.

Q In the morning?

A Well, 12:20 would be in the afternoon. Yes, sir.

Q Well, do you believe that's an afternoon date stamp or a very early morning date stamp?

A Could be either one. It wasn't in the hundred. So it could be either one.

Q All right. In either event, whatever it was, afternoon or morning, it was wrong.

A The time stamp on there and the date was wrong. Yes.

Q And that was another mistake?

[162] A Yes, sir.

Q Did you ever bring it to the attention of the Drug Enforcement Administration or other law enforcement personnel that their vehicle and recording equipment was stamping evidence with the wrong date and time?

A It was mentioned during the debriefing when we talked that the tape had the wrong date on it. But at that point in time, it was really not much we could do on changing what had occurred.

Q Well, it was mentioned during the debriefing. But did you inform those who would have to use this equipment on future operations?

A That would be members of the D.E.A. and, yes, sir, I did.

Q Okay. Who did you inform?

A Well, like I said, when we debriefed after the initial buy and when we got finished, it would have been members of the group I was with at that time which would be Detective Duane Crawley, Special Agent John Flickinger, Special Agent Troy Wilson. I believe Priscilla Pressley who—Priscilla Lewis who was also the group sup was also advised.

Q Did you participate in any way in preparing any search and seizure warrants in this case?

A No, sir, I did not.

Q Did you ever review any search and seizure warrant [163] applications prepared by Detective Crawley in this case?

A I did not on this case. No.

Q Do you know who Eric Wright is?

A No, I do not.

Q All right. Now you know that James Wright, my client, as a result of this operation was arrested initially in Baltimore County. Did you know that? I'm sorry. Baltimore City.

A Yes. He was arrested in Baltimore City that day.

Q And you also know that a search warrant was obtained for purposes of searching the residence of Dante Couther in Baltimore County?

A That is correct.

Q Did you participate in any way of preparing the application for that search warrant on Mr. Couther's home—

MR. WALLNER: Objection. Asked and answered.

THE COURT: Sustained.

Q Did you participate in any way or review any documents prepared by Detective Dudenhoffer in Baltimore County in connection with that?

MR. WALLNER: Objection.

Q I'm sorry. In connection with the arrest.

THE COURT: Sustained.

Q Did you know that Officer Dudenhoffer filed a statement of charges against Mr. Wright in the District Court of Maryland for Baltimore County arising out of this operation?

[164] A No, I did not.

Q Did you participate in the arrest of Mr. Couther and Mr. Wright?

A No, sir, I did not.

Q Were you present at any point when they were being processed?

A No, sir.

Q And you did not submit the DEA-7 form regarding the testing of the—

A No, sir, I did not.

Q —material provided by Mr. Saffell, did you?

A No, sir.

MR. BOURGEOIS: All right. I have no further questions.

THE COURT: Any redirect, Mr. Wallner?

MR. WALLNER: Briefly, Your Honor. Thank you.

REDIRECT EXAMINATION

BY MR. WALLNER:

Q Detective, let's just clear up a few things. Mr. Bourgeois asked you about the term, eyeball. Can you explain to the ladies and gentlemen of the jury what that means?

A Eyeball is basically the observation of our target vehicle. We would continually have rotating vehicles going in and out of watching Jeff Saffell drive the vehicle while he has James Wright and company inside the vehicle and basically we call [165] it the revolving eye. Every so often, we change the eyeball so we continually have somebody on surveillance so we always have our observations to go along with the conversation of what's going on with the investigation.

Q What would be the purpose of revolving the eyeball as you call it?

A So that nobody gets, nobody—we knew that Jeffrey Saffell knew that we were following him, but James Wright didn't know that we were following him. So we continually changed vehicles so that they don't see the same vehicle over and over again behind them, make them suspicious, make them think that something might be up.

Q To your knowledge, was an eyeball on the, Mr. Saffell and Mr. Wright at all times during this transaction to your knowledge?

A Yes, there was.

Q And how would you know that?

A Just through conversations on our radios and contacts we had back and forth.

Q You indicated that the D.E.A. vehicle that was used in this indicated had the wrong date and time on it. Is that correct?

A That is correct.

Q Did you have any part in the wiring of this vehicle or the setting of this VCR—

[166] A No, sir, I do not.

Q Who was responsible for the maintaining of this particular—

A D.E.A. has a tech team that takes care of that type of equipment.

Q The tech team, were they part of your investigative unit in this particular case?

A No, they were not.

Q Did they have anything to do with you, this investigation or are they just to maintain technical equipment?

A They just maintain technical equipment, tell you how to use it if you don't know how to use it, stuff like that.

Q You indicated that you've misplaced now that we've gone through this this controlled call, telephone call. Is that correct?

A That is correct.

Q How soon after this controlled call was placed did you have to begin the surveillance as it were?

A Once the controlled call was made, within ten minutes, we were on the road.

Q So this wasn't a situation, correct me if I'm wrong—what would you have had to have done to properly log this into evidence?

A Well, if I got my memory right, we'd have to do a 7(a), have to process it the same way you process the drugs. Have to [167] do a report, you have to bag it up, you'd seal it and then you take it over to the evidence vault and they would submit it.

Q Is there any procedural—is there anything wrong with the procedure you used to maintaining it in your custody for the time being?

A For nondrug evidence, you have five days to submit it in D.E.A.

Q And then in that timeframe is when you were transferred. Is that correct?

A That is correct.

Q Why would you have to get the surveillance moving within ten minutes of this controlled call?

A Because during the controlled call, we told them, Jeffrey Saffell told him that he was on his way and too much of a delay either way again will raise suspicion. We try not to raise any suspicion when we're trying to do investigations like this. So the sooner we can get there, the less, the more at ease the suspect is when we arrive. The more delay we have, the more suspicion rises up. Why does it take you so long? Why does it do this and that? So it's easier once we make the call, just go out and do it.

Q You indicated that, you used the term, double dipping. Can you explain to the ladies and gentlemen of the jury what you meant by that term?

A Well, double dipping is basically, simply put, is that [168] he is on contract or he does work for the Baltimore City Police Department providing us information for us to take out drug dealers and drug investigations and on his own, when he's not with us, he is also participating in and selling and gathering drugs for profit.

Q Is Mr. Saffell the first confidential source that you're aware of that has double dipped?

A No, sir, he's not.

Q You indicated throughout the cross-examination that you learned that Mr. Saffell was double dipping. Is that correct?

A That is correct.

Q And you learned that that occurred sometime after he signed his plea agreement on June 10th of 2003. Correct?

A That is correct.

Q When you learned of this particular double dipping as you called it, what if anything did you do with regard to Mr. Saffell?

A At the point in time that we learned that he was participating in this ectasy lab, he had already fulfilled his contract. So we were pretty much done with him. So—

Q I'm sorry. When you say fulfilled his contract, what do you mean by that?

A He had a certain amount of investigations he had to do in order to get what was the terms of that contract which I believe—

[169] Q Do you know the terms of that contract?

A The terms of the contract were ten years, eight years suspended, two years home detention.

Q That was the original contract?

A That was the original contract that he signed.

Q The one that was dated June 10th of 2003?

A Yes.

Q And as a result of that contract you and I assume a prosecutor in the State's Attorney's Office, is that correct?

A That is correct.

Q Who is that prosecutor?

A Nancy Olin.

Q Did you decide what if any help or what amount of help Mr. Saffell should provide? Is that correct?

A Yes. What we do in order to do this contract, we bring him in, we sit down, we do what's called a proffer. He tells us exactly what investigations or individuals that he could help us take off the streets. At which time, we decide that three, maybe four investigations he said he could do. We agreed that was good. And then the prosecutor comes back to say, well, if you do those four investigations, we'll give you the sentence of the ten years, suspend all but eight, two years home detention.

Q And you indicated that by the time that you learned of this double dipping as you called it, Mr. Saffell had completed at least on its face the terms of that contract?

[170] A That is correct.

Q Once you learned of the double dipping, what if anything did you do?

A We were investigating and we were actually moving forward to actually writing search and seizure warrants for at least one location where we thought the lab was at.

Q Did you learn that Mr. Saffell may be involved in this lab?

A Yes, sir, we did.

Q And when you learned that Mr. Saffell may be involved in the lab and that he had violated his agreement, what if anything did you do with regard to Mr. Saffell?

A Well, we didn't have, I didn't have any more contact with him at that point in time and I hadn't had any contact with him for a while because again he had already fulfilled his contract and he was pretty much just doing what he wanted to do on his own and I was working on other investigations. So at that point in time, another detective down at HIDTA was working on this ectasy lab, at which time he asked me about Jeffrey Saffell and I said, I told him what I knew about him and I was assisting him at that point in time trying to take out that laboratory with Jeffrey Saffell.

Q Did there come a time where you had a conversation with Mr. Saffell regarding this?

A Yes, we did.

[171] Q And what did you tell him?

A Well, at this point in time, I told him that we knew he got arrested in Baltimore County, that there was nothing we could do for him either way, that he was on his own. That if he wanted to help us work with this particular investigation onto this lab, that the only thing that I could do is maybe go in front of the courts and tell them what you did, basically give him a good word because that he had violated the contract and there was nothing I could do.

Q What is your knowledge of the sentence that Mr. Saffell now faces, your knowledge of the sentence Mr. Saffell faces as a result of this violation of this agreement?

A According to Nancy Olin, he's going to get ten years.

Q And that is the recommendation from the State prosecutor?

A Yes, sir, it is.

Q And that was the maximum agreement that was signed on June 10th of 2003. Is that correct?

A That is correct.

MR. WALLNER: I have nothing further.

THE COURT: Is there any recross just limited to the redirect, Mr. Bourgeois?

MR. BOURGEOIS: Yes, Your Honor.

RECROSS-EXAMINATION

BY MR. BOURGEOIS:

[172] Q Have you read Mr. Saffell's plea agreement of June 10, 2003?

A I didn't read the agreement. No.

Q All right. What is the sentence that Mr. Saffell is going to receive in connection with his involvement in the manufacturing of ectasy and building a drug lab?

A He's not getting a sentence on that.

Q Okay. And you also are aware that the Baltimore County charges against him were dropped. Correct?

A I heard they were stetted. Yes.

MR. BOURGEOIS: Okay. No further questions.

THE COURT: Thank you, Detective Smith. You may step down, sir. Sir, there is a sequestration order in effect in this case so that you should not discuss your testimony with anyone in the event that you're called back to the witness stand—

THE WITNESS: Yes, sir.

THE COURT:—during the course of this trial. Thank you very much.

MR. WALLNER: Your Honor, it's the Court's pleasure. I can call another witness or—

THE COURT: Yes. Why don't you come up to the bench for one second, please?

(Bench conference:)

THE COURT: Incidentally, I see that there are some people in the courtroom. I assume they're not witnesses. I ask [173] both of you to just—

MR. BOURGEOIS: We'll monitor that.

MR. WALLNER: Just Mr. Risberg.

THE COURT: He's not going to be a witness. All right. Who's the next witness?

MR. WALLNER: I have Mr. Newby from the lab. It should be very brief. Then I think we can take a real quick break.

THE COURT: My view is why don't we—I was going to take a break around 20 after 11. Is he about a ten-minute witness?

MR. WALLNER: It depends on cross. It shouldn't be that much longer.

THE COURT: All right. Let's put Mr. Newby on.

MR. WALLNER: Very well, Your Honor.

(In open court:)

MR. WALLNER: Your Honor, the Government calls—

THE COURT: Hold on one second, please, Mr. Wallner. Ms. Moye has advised me that this might be an appropriate time to take a break. We were going

to wait another ten minutes, but we'll take a break now. So we'll take our mid-morning recess now.

(Recess.)

THE COURT: Get the jury.

MR. WALLNER: Your Honor, I'm sorry. May we approach real quick?

[174] THE COURT: Yes. Certainly. Come on up.

(Bench conference:)

MR. WALLNER: Just on the matter of scheduling, what I anticipated is that we'll finish with Mr. Newby relatively quickly. I then have two special agents to put on the stand that were part of the surveillance. That will be Special Agent Troy Wilson and Special Agent John Flickinger.

THE COURT: Okay.

MR. WALLNER: And then I would hope—Mr. Saffell is here now. But he is not in court attire and they're going to try and go get him a suit from his home which is in Essex. I just want to give the Court notice if we break a little early, he'll be back in time to start at 1 or 2:00, but—

THE COURT: What do you suggest, that we break for lunch at what time?

MR. WALLNER: Well, whenever we finish these next three witnesses and then which I don't think again would be—

MR. BOURGEOIS: Is he in custody?

MR. WALLNER: Who, Mr. Saffell?

MR. BOURGEOIS: Yeah.

MR. WALLNER: No. No, no. He just needs a ride.

MR. BOURGEOIS: He's not in court attire.

MR. WALLNER: No, no, no.

MR. BOURGEOIS: Bad decision he made.

MR. WALLNER: No, no, no. That wasn't the issue. I [175] just wanted to give the Court the heads up. I mean I expect Mr. Newby to be 15 minutes tops. I expect Special Agent Flickinger to be maybe 20 minutes and Special Agent Wilson again maybe 20 minutes which will take us to like 12:30. I just didn't want the Court to expect me to put Mr. Saffell on the stand at 12:30 and then break for lunch and then go from there and then—

THE COURT: We are going to have to have the tape set up.

MR. WALLNER: Correct.

THE COURT: So after Newby, Wilson and Flickinger, we'll see where we are.

MR. WALLNER: Very well, judge. Thank you.

(In open court:)

THE COURT: Yes. You may bring the jury in. Thank you.

(Jury present.)

THE COURT: All right. You all may be seated. Thank you. Mr. Wallner, next witness?

MR. WALLNER: Your Honor, the Government calls Mr. Norman Newby to the stand.

THE COURT: All right. Mr. Newby, if you'll take the oath, please?

(Witness sworn.)

THE CLERK: Please be seated. Please speak directly into the microphone. State your full name for the record and [176] spell your last name, please.

THE WITNESS: Norman Russell Newby, Jr. N-E-W-B-Y.

THE CLERK: Thank you.

THE WITNESS: You're welcome.

DIRECT EXAMINATION

BY MR. WALLNER:

Q Mr. Newby, can you explain to the ladies and gentlemen of the jury what your responsibilities are, sir?

A I work for the Drug Enforcement Administration and I analyze any suspected narcotics that is given to me by my supervisor and I also keep up with the state of the art of the instrumentation that can identify these compounds.

Q Do you have any specialized training or education that allows you to hold such a position, sir?

A Yes. I received a B.S. degree at American University. When I first joined, it was called the Bureau of Narcotics and Dangerous Drugs and then the name switched to D.E.A. I took a six-month training course in analyzing suspected narcotics and I still keep up with the state of the art of the instrumentation that applies to these compounds.

Q How long have you held your present position, sir?

A I've been working for D.E.A. about 33 years.

Q And during that time can you estimate for the ladies and gentlemen of the jury how many different types of controlled substances you've tested?

[177] A I've tested multitudes of drugs, phenetamines, which includes methamphetamines, amphetamines, centramines and cannabinoid alkaloids, cocaine, heroin, PCP, the whole gamut of the controlled, LSD, the whole gamut of controlled substances.

Q Have you ever been qualified to testify in court as an expert witness in forensic chemistry?

A Yes.

Q And how many times, sir? Do you know?

A In the federal court in Baltimore, approximately 40 times. The state court of Baltimore, it's several times. Several jurisdictions, Ellicott City and in Cecil County and in federal court in the District of Columbia over 60 times, Superior Court of District of Columbia over a hundred times, different jurisdictions in Florida and different jurisdictions in Virginia and West Virginia.

MR. WALLNER: Your Honor, at this time I'd ask Mr. Newby be recognized as an expert in forensic chemistry.

THE COURT: Yes. So proffered. And do you have any voir dire on this, Mr. Bourgeois?

MR. BOURGEOIS: I certainly don't. We accept him as an expert.

THE COURT: All right. Thank you, Mr. Bourgeois. Ladies and gentlemen, there's usually a rule that witnesses cannot give their opinions with respect to certain matters. But this gentleman has been qualified as an expert. Accordingly, [178] he's been qualified as an expert in forensic chemistry and he is entitled to give his opinion in terms of the contents of any package that he examined with respect to the nature of the drug and substance and you may accept

his opinion in that regard. You may continue, Mr. Wallner.

MR. WALLNER: Thank you, Your Honor.

Q Mr. Newby, let me show you what is now in evidence as Government's Exhibit Number 4. I'm going to ask you to look at that item and tell the ladies and gentlemen of the jury whether you recognize it.

A Yes, I do. Government's Exhibit Number—

Q Top right hand side.

A —oh, 4 is a D.E.A. heat seal and it has a logo and the evidence sticker on it. When I first received Government's Exhibit 4, I place my initials up top against whoever placed this stuff inside the bag and then when I was ready to analyze it, I clipped the bottom part, put the file number, the lab number and the date and then proceeded to open up inside and to analyze whatever was found in Government's Exhibit Number 4.

Q Would you explain to the ladies and gentlemen of the jury the process you used in order to analyze that particular substance?

A First of all, if it's a suspected cocaine base, we're required to take a photograph of the evidence and I took that photograph and—

[179] Q I'm sorry. Stop right there. Let me show you Government's Exhibit Number 6. Do you recognize that?

A Government's Exhibit Number 6 is a photograph of Government's Exhibit Number 4, the evidence. I have my initials, my name, the date, the lab number, the file number, the exhibit number and I placed this—after taking the picture, I placed it with the rest of the analysis and completed the report.

Q Does that fairly and accurately—Government's Exhibit 6, excuse me, does that fairly and accurately represent the way Government's Number 4 looked the day you analyzed it?

A Yes.

Q Aside from taking a photograph, what if anything else are you required to do to analyze Government's Exhibit Number 4?

A To analyze the substance in Government's Exhibit Number 4.

Q Yes, sir. What exactly did you do?

A I took a, what was in Government's Exhibit Number 4. It was lumpy material. I ground it up to make it homogenous so any place or somebody coming behind me in analyzing that substance would possibly get the same result. The first test I did was I wanted to identify what substance I am dealing with and the infrared spectra, that's a part of the magnetic radiation spectrum. The infrared is passed through the sample and the matrix and it will vibrate different functions on that compound and you'll get a sharp peak or a narrow peak depending on the [180] compounds in that compound and the spectra matched up to the cocaine base. This is a positive test because it will also give you the salt form if it has the hydrochloride ion attached to it.

The next test is also a specific test. It's a GC mass spec. I took my sample and I got it ready for the quantitation and I took that solution and I injected it into the G.C. mass spec. The G.C. part of the instrument will separate out numerous compounds that are in your sample and the analyzer will analyze what each compound is coming out and the spectra that it matched up to was cocaine.

The next test I did was a quantitation test to see, to determine how much cocaine base is in that sample. I

used a GC chromatogram. I made my standard up. I ran that and then I ran the sample and it came to 41 % cocaine base.

And the last test I did was a, which is a requirement for D.E.A. exhibits is a G.C. screen. This screen will determine what compounds are in there and if there is anything else in that mixture and it came out to be cocaine in there and also dilatriaziam, which is a hypertensive. And then I also ran an I.R. on the chloroform insyables and that turned out be anastatol.

Q Did you actually weigh the substance?

A Yes, I did.

Q And what was the weight of the substance?

[181] A 55.3 grams.

Q Did you weigh that substance before or after you conducted the analysis?

A I weighed it before. What I took, I took the package, the plastic bag with the material in it. I weighed it and then I dumped the material out and weighed the plastic bag and subtracted and that gave me the 55.3 grams.

Q Sir, do you have an opinion to a reasonable degree of scientific certainty as to the type of substance which is contained in Government's Exhibit Number 4?

A Yes. It's cocaine base, 41%.

Q And, sir, did you prepare a report as part of your requirements in testing that substance?

A Yes, I did.

Q I'll show you what's Government's Exhibit 5B. Do you recognize that report, sir?

A Government's Exhibit Number 5B is a report I prepared. It was 41 % and 55.3 grams on the report and I signed down below my name and the date.

Q And sir, does that report you have have a case number on it?

A Yes, it does.

Q What's the case number?

A GC-04-0279.

Q And an exhibit number?

[182] A It's Exhibit 1 and the lab number is 77138.

Q I ask you to look just briefly at Government's Exhibit Number 4 and tell the ladies and gentlemen of the jury what case number and exhibit are on that.

A Government's Exhibit Number 4 has the lab number which is 77138. It has a case number which is GC-04-0279 and the Exhibit Number 1.

MR. WALLNER: Your Honor, I'd move in Government's Exhibit 5B, Government's Exhibit Number 6.

THE COURT: So admitted.

MR. WALLNER: I have nothing further, Your Honor.

THE COURT: Thank you. Mr. Bourgeois?

MR. BOURGEOIS: Very briefly. May I approach the witness, Your Honor?

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. BOURGEOIS:

Q Mr. Newby, looking at Government's Exhibit 5B, which is your report, about halfway down the page, it reads "Note: The packaging has been separated for fingerprint analysis pending receipt of the required information from agent." Is that correct?

A Correct.

Q Did your lab perform that fingerprint analysis?

A No, it did not. The fingerprint evidence technician [183] left and we send it, the materials if the fingerprint cards come, we send it to New York to have them do it.

Q Okay. And do you know whether any fingerprint analysis was done on this evidence?

A No, I don't.

Q You don't know one way or the other?

A No.

Q Okay. And I just want to be clear here just to make sure I understand. Up in the upper left, it says gross weight, 89.2 grams.

A Correct.

Q And that's referring to the substance plus the plastic packaging. Is that—

A No. It refers to the total weight. When I receive the evidence, I weigh the whole bag and everything in it and also write who I received it from. I received it from a Nicole McGregor, the date I received it and the weight which is 89.2 grams.

Q Okay. So you're saying this entire package including this outer wrapper and its contents was 89 grams?

A Correct.

Q All right. And the substance you tested exclusive of the plastic wrappings and labels and everything was 55.3 grams. Correct?

A Correct.

[184] Q And of that substance, only 41 % of it actually constituted cocaine base. Correct?

A Correct.

Q Now could you please tell us what equipment, I think you described at least two pieces of equipment that you used to analyze this substance. The GC mass spectrometer, you also did some sort of infrared

spectra analysis. What equipment was used for the infrared spectra analysis?

A It's the instrument, it's a nickel lay instrument. That you place your sample in the beam, path of the beam and it produces a spectra and this is an infrared instrument.

Q All right. And does that equipment require calibration?

A No, it does not.

Q Okay. Does it use—

A Excuse me, excuse me. It is calibrated monthly.

Q All right. And do you know when it was last calibrated before you performed your—

A No, I don't. I don't do it. But it's in the log book at the lab.

Q Are you familiar with how to calibrate that equipment?

A No, I'm not.

Q Are you familiar with how to maintain that equipment?

A When it needs maintenance, you can view your spectra and if it's not running right or the laser is out or something [185] like that, you just call the maintenance guy and they come out from the company.

Q And how would you know if the laser is out?

A Because I wouldn't get any signal.

Q How would you know if the laser is properly focused?

A If I put my sample in and if the laser has gone through that sample at that particular time, yes.

Q Does that equipment use any negative controls or positive controls?

A No, it does not.

Q Okay. So—

A What we do, we run to make sure that nothing is in the beam that would cause either to have some-

thing else is we run a background on our matrix which is KBR and I ran a background on each infrared spectra.

Q All right. So there is a control mechanism?

A Yes.

Q All right. How about the GC mass spectrometer? That requires calibration, does it not?

A Yes it does.

Q All right. And when was the last time that machine was calibrated before you used it?

A To my knowledge, it gets calibrated every day.

Q All right. And do you know how to calibrate it?

A I can calibrate it, but I don't. I'm not the monitor [186] of that instrument. So I don't calibrate it.

Q So you rely on other people to calibrate the—

A Correct.

Q —equipment you use? Okay. And you don't know—do you know who in fact calibrated it before you used it?

A Joe—actually, his last name is Polish and I can't pronounce it. Sorry.

Q Fair enough. I have a difficult last name myself.

MR. BOURGEOIS: I have no further questions for you, sir.

THE COURT: Thank you, Mr. Newby. You may step down, sir.

MR. WALLNER: Your Honor—

THE COURT: I'm sorry. Yes, Mr. Wallner?

MR. WALLNER: Just briefly. I apologize.

THE COURT: That's all right. No. I apologize for cutting you off.

REDIRECT EXAMINATION

BY MR. WALLNER:

Q Mr. Newby, I apologize. Just briefly, you've indicated you have to weigh that substance in the bag in its entirety when you receive it. Is that correct?

A Correct.

Q What's the purpose of doing that?

A To match up on the—I don't have the DEA-7 with me. [187] But to match up with the DEA-7, roughly, what's on the DEA-7 and if they are off, we have to notify them. They have to be plus or minus .2%.

Q Did you do that in this case?

A Pardon?

Q Did you do that in this case?

A Yes.

Q And aside from that, what was the net weight of the substance?

A The net weight of the substance was 55.3 grams.

MR. WALLNER: Nothing further, Your Honor.

MR. BOURGEOIS: Brief followup, Your Honor?

THE COURT: Yes, Mr. Bourgeois. Just on that point.

MR. BOURGEOIS: Yes, sir. May I approach and hand him—

THE COURT: Yes. Go right ahead.

RECROSS-EXAMINATION

BY MR. BOURGEOIS:

Q Is this the DE-7 to which you just referred?

THE COURT: The DEA-7.

MR. BOURGEOIS: Yes, sir. I apologize. I'm sure I slurred that.

A I don't know. There is no lab numbers or whatever on this.

Q Well, this is what the Government gave me. Perhaps the [188] Government has a more complete exhibit. Sir, I'm going to hand you this document. Is this the DEA-7 form?

A Correct.

Q And do you see on the bottom right in the middle in dark letters, it says Request For Fingerprint Analysis?

A Yes, sir, I do.

Q All right. Was that part of the request made of the lab by the submitting officer?

A Whoever submitted the DEA-7, they requested it.

Q All right. And you said earlier I believe that you needed to match up the gross weight of this package with what was submitted to you.

A Correct.

Q Could you read for the jury the weight as indicated on the DEA-7 submitted by the officers?

A 88.8 grams.

Q Okay. Thank you, sir.

MR. BOURGEOIS: No further questions.

THE COURT: Thank you. Mr. Newby, you may step down, sir. There's a sequestration order in effect in this case. So you should not discuss your testimony with anyone in the unlikely event that you were called back to the witness stand until the conclusion of this trial.

THE WITNESS: May I be excused?

THE COURT: Yes. You certainly may, sir. Thank you [189] very much.

MR. WALLNER: Your Honor, the Government will call Special Agent John Flickinger.

THE CLERK: Please raise your right hand.

(Witness sworn.)

THE CLERK: Please be seated. Please speak directly into the microphone. State your full name for the record and spell your last name, please.

THE WITNESS: John Flickinger. F-L-I-C-K-I-N-G-E-R.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. WALLNER:

Q Mr. Flickinger, can you tell the ladies and gentlemen of the jury what your assignment is, please, sir?

A Yes. I'm a agent with the Drug Enforcement Administration.

Q And how long have you been with the Drug Enforcement Administration, sir?

A A little over eight years.

Q And in that time, can you briefly describe for the ladies and gentlemen of the jury some of your responsibilities as a special agent for the Drug Enforcement Administration?

A In investigating drug trafficking organizations wherever I'm stationed, interviewing C.I.'s, doing surveillances, writing reports.

[189] Q I draw your attention to September the 14th of 2004. Do you recall that day?

A Yes, I do.

Q And were you working that day?

A Yes.

Q What were your responsibilities as a Drug Enforcement Administration agent on September 14th of 2004?

A On that day, I was helping in the surveillance of James Wright and a confidential source meeting.

Q Did you—Court's indulgence. Strike that. Explain to the ladies and gentlemen of the jury what if anything you did with regard to your aspect of the investigation?

A On that day, we were going to do a controlled buy with a confidential source and James Wright and prior to the buy, I set up, established surveillance in the area of where we were going pick up James Wright in front of his mother's house.

Q Do you know where that was?

A Yes. 2226 East Madison Street, Baltimore.

Q How did you know to go to 2226 East Madison?

A Beforehand, the case agents, Duane and Sergeant Smith, had told me that that's where the C.S. was going to be going and to pick up the target, James Wright.

Q And where did you position yourself in an effort to observe this location?

A I was parked just on the same side of the street, a [191] little further down East Madison Street from the location where this C.I. was going.

Q Approximately how far?

A Approximately a block.

Q Did you have occasion on that date to observe the confidential source arrive at that particular location?

A Yes, I did.

Q Tell the ladies and gentlemen of the jury what happened, what you observed on that day.

A About 3:15 p.m., I was on that street and at that time I saw the C.I. arrive in his vehicle.

Q I'm sorry. You say C.I. Can you—what does that mean?

A Confidential informant.

Q Just an acronym. Correct?

A Yes. Correct.

THE COURT: Just for the record, C.S. and C.I. are either confidential source, confidential informant. It's referring to the same person. Correct?

THE WITNESS: Yes, Your Honor.

THE COURT: All right.

A And the C.I. arrived in his vehicle and I saw him park. He parallel parked on the side of East Madison Street and while he was waiting there, he waited just a short time and then James Wright came from the right hand side of the, like the brownstones [192] and then got into the passenger side.

Q Did you see him exit a dwelling? Did you see Mr. Wright exit a dwelling?

A I could see him come from the right hand side, but I wasn't sure if he was like on the top of a steps or a stoop. So I really picked him up when he started walking towards the C.I. vehicle.

Q Do you see Mr. Wright in the courtroom here today?

A Yes, I do.

Q Can you identify him for me for the record?

A Yes. He's sitting at that table.

MR. WALLNER: Your Honor, for the record the witness has identified the defendant seated next to his counsel.

THE COURT: The record will so reflect.

Q Special Agent Flickinger, after you observed Mr. Wright come out of the, what you term the right

hand side, what if anything did you observe him to do?

A He walked across the sidewalk and then entered the front passenger side of the confidential source's vehicle.

Q To your knowledge, were you able to observe how many occupants of the vehicle was, how many occupants were in the confidential source's vehicle?

A Just the confidential source and James Wright.

Q Prior to observing Mr. Wright on September the 14th of 2004, did you know who you were looking for?

[193] A Yes. Prior to us going out on the controlled buy, the case agents had showed us a photo of James Wright.

Q And once Mr. Wright entered the confidential source's vehicle, what if anything else occurred?

A It was very shortly after the vehicle, you know, left East Madison and I guess it was going west on East Madison towards Hopkins.

Q And did you maintain what they call the eye on this surveillance at that time?

A Yeah. That's correct and—

Q Go ahead.

A I just maintained the eye as it went on East Madison and then I think it was right at the University of Johns Hopkins, it took a right and I stayed with it and then eventually, we passed off the eye and just maintained a surveillance on it.

Q When you say you passed off the eye, can you explain to the ladies and gentlemen of the jury what you mean by that?

A When Mr. Wright got into the confidential source's vehicle, I was the primary one, the closest one who actually was calling it out on the radio, you know, that they were leaving on East Madison, that

he had gotten into the vehicle, that they were leaving and I was pretty much the closest person in surveillance to the confidential source's vehicle and Mr. Wright. And then as I followed after a certain amount of time, when they made a turn, I then passed off the eye or let someone else be like the closer [194] person in the surveillance.

Q How long did this surveillance take or how long were you part of the surveillance?

A It was over an hour. I think we started around 3:15 and it went to a little bit after 4:30.

Q And during that time, how often did you rotate to become the eye?

A Four, five times during that time.

Q And during that time, could you tell the ladies and gentlemen of the jury who if anyone you were able to observe in that vehicle?

A At different times it was Mr. Wright and the C.I. and then I think, I'm not sure, I don't think, I didn't have the eye after the other, Dante Couther had been in the vehicle. I had seen him walking towards it, but I didn't actually see him get into it.

Q You saw another individual walk towards this vehicle?

A Correct.

Q During that time period, were you able to learn whether or not other individuals had been in and out of that vehicle?

A Yes. Prior to me seeing one of the other people on the surveillance had said that, you know, he picked up a third person or the C.I. had picked up a second person in addition to Mr. Wright. It turned out to be Mr. Couther and they had also put it out over the radio that they had let off Mr. Couther.

[195] Q So you were able to and at different times you had rotated through. Is that correct?

A That's correct.

Q So during that time period, could you estimate how many different times you were able to observe Mr. Wright and/or Mr. Saffell, the C.S., in this vehicle?

A Approximately four to five times.

Q And during what time period—how long would your period as the eye last?

A Each time depending on the turns they made, 30 seconds to a couple of minutes.

Q Then that would rotate to someone else. Is that correct?

A That's correct.

Q So what would happen after you—after you were no longer the eye, how would that happen?

A If I was following like them, for example, when I followed them right at East Madison Street, after his first turn, I turned with him and then I stayed with him, I was the eyeball for a little bit more when he was going north on that next street and then shortly after, I would say okay, I'm going to pass off the eye and then someone would say, okay, I'm going to take it.

Q To your knowledge, was there any period of time where the vehicle itself was not under surveillance?

MR. BOURGEOIS: Objection.

[196] THE COURT: Overruled.

A I think actually for almost the entire surveillance, it was under surveillance. There were maybe lapses of very short time if someone was getting like, sometimes when someone has the eyeball, they may go up a half a block to change, you know, and get a better position and things like that. But pretty much, it was constant surveillance.

MR. WALLNER: I have nothing further, Your Honor.

THE COURT: Thank you, Mr. Wallner. Mr. Bourgeois?

MR. BOURGEOIS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WALLNER:

Q Now let's just pick up where Mr. Wallner left off. You say there likely were lapses during the surveillance when Mr. Saffell and the occupants of his car may not have been under direct eyeball view of an officer. Is that correct?

A There was possible—I don't say likely. There's possible times when there are short lapses. Yes.

Q Okay. Now can you tell us who besides you constituted the various eyeballs that apparently would trade off during the course of this surveillance?

A There was myself, there was Special Agent Troy Wilson, there was Sergeant Smith, Task Force Officer Matt Glassman, there was also Special Agent Rosati. I think there was also Detective John Jendrek. I think also Duane Crawley. I don't know if I [197] mentioned that.

Q How about Byron Scott?

A I don't recall. I think he was riding with Sergeant Smith, but I'm not sure.

Q Okay. Who was riding with you?

A I was alone.

Q Okay. Do you know who was riding with Special Agent Rosati?

A No, I don't.

Q Do you know who was riding with Task Force Officer Glassman?

A No.

Q How about Officer Jendrek?

A No, I don't know.

Q Do you know who was riding with Troy Wilson?

A No.

Q Okay. Is it possible that each of these persons constituted a separate eye in a separate car?

A Yes.

Q Okay. And obviously, you can only testify about what you personally observed. Correct?

A Yes.

Q You don't know, for example, what Officer Jendrek may have observed. Correct?

A Apart from things they put out on the radio.

[198] Q Okay. Well, you would understand that to be hearsay. Correct?

MR. WALLNER: Objection.

THE COURT: Sustained.

Q All right. You don't know other than what you hear on the radio what other people claim that they are seeing other than what you yourself see. Correct?

MR. WALLNER: Objection. May we approach, Your Honor?

THE COURT: Yes.

(Bench conference:)

MR. WALLNER: Your Honor, the Fourth Circuit is apt with case law that a police officer can act upon those of the law enforcement team. To suggest that while this individual may not have personal knowledge, I know of cases where an officer can step out from behind a bush and tell them to arrest Mr. Bourgeois to another officer and that would be sufficient. So—

THE COURT: You are talking about the Fourth Circuit case that talks about—I forget the name of the case—that talks about attribution—

MR. WALLNER: Correct.

THE COURT: The officers can act upon that. I don't know that Mr. Bourgeois is getting to that area. Clearly, a case agent can and another officer working for the surveillance team can talk about what is done in the normal course in his surveillance and the surveillance of others. You've established [199] that, he's said that he can't say that every second, every minute that—

MR. BOURGEOIS: I'm not even following up any more than that.

THE COURT: That's fine.

MR. WALLNER: I think the issue was is that it was no indication he could rely upon what those individuals are saying as being truthful and that's not the case—

MR. BOURGEOIS: That's not the inference at all.

MR. WALLNER: Okay. Very well.

(In open court:)

Q While you were, when your eyes were on the vehicle, did you observe, were you the person, the eyes on the vehicle at the time the vehicle stopped at a convenience store?

A I had saw it stopped at the convenience store.

Q Okay. And did you observe, did you continue to watch the vehicle while it was at the convenience store?

A I didn't watch it the entire time it was at the convenience store. That was one of the times where I

actually had to drive by because of the traffic and then I think someone else maintained the eye.

Q Okay. Do you know if that other person picked up the eye immediately once you lost view or whether there might have been a lapse there?

A I actually think at that time that they had the eyeball [200] pretty much the same time I did because they were calling it out at the same time when I was passing.

Q All right. Now when you passed it, did you come back to see what was occurring at the convenience store?

A No, I did not.

Q For the brief time you saw the vehicle at the convenience store, did you see Mr. Saffell get out of the car?

A No, I did not.

Q Okay. Did you see Mr. Wright get out of the car at the convenience store?

A No, I did not.

Q All right. So you have no knowledge of what may have occurred at that convenience store?

A No. I just saw the car parked at the convenience store.

Q All right. Now thereafter in the course of this surveillance, did there come a time when you saw that the vehicle stopped at the Prima Foods building off Erdman Avenue?

A Yes.

Q Okay. Did you personally observe that?

A Yeah. I had seen it pulling into the parking area.

Q Okay. And did you observe Mr. Saffell get out of the car on that occasion at the Prima Foods store?

A No, I did not.

Q All right. Did you see Mr. Wright get out of the car [201] at the Prima Foods store?

A No, I did not.

Q Do you have personal knowledge of when the drugs—well, let me back up. The stop at the convenience store that we talked about a moment ago, that occurred before Mr. Couther got in the car. Correct?

A Yes.

Q And the stop at the Prima Foods store occurred before Mr. Couther got in the car. Correct?

A Yeah. I believe so. Okay. Now did you participate in the actual arrest of my client, Mr. Wright?

A Yes.

Q Okay. And you in fact helped take him into custody. Correct?

A Yes.

Q Where did that occur?

A I don't know the exact intersection. It was about five to ten minutes after we left the area of Hillsway.

Q All right. Did you maintain any field notes of this operation as you were involved in it?

A No. I don't have any field notes of the arrest.

Q Okay. Do you have any field notes of anything you observed during the course of this operation?

A No, I don't, I don't believe so.

[202] Q Okay. Did you maintain any and I guess you just said you had no notes concerning the actual arrest. Correct?

A Not of the actual arrest. No.

Q Did you in fact search Mr. Wright when you arrested him?

A No, I did not.

Q All right. Do you know who did if anyone?

A No. I'm not aware of who searched him.

Q Did you not take off of his person his birth certificate and resume and other documents?

A Some of the personal documents from after he had been searched, they transferred to me and then also the case agents.

Q Okay. So among the documents that were transferred to you was Mr. Wright's birth certificate. Correct?

A Actually, I don't recall his birth certificate. I'd have to refer to the report and see if that had it in it.

Q Okay. Well, did you prepare a report, a property inventory or anything like that?

A With regard to the birth certificate?

Q Yes, sir.

A I don't recall.

Q All right. Do you recall a resume being among the documents that were removed from Mr. Wright?

A Once we—I don't recall.

Q How about a copy of his driving record? Did he have [203] that on him?

A He did have documents on him. I don't remember who actually took them and actually took them into custody.

Q All right. Well, you indicated that whoever did that transferred them to you at one point. Correct?

A Yes. Some of the documents, they transferred to me, but I don't recall which documents.

Q All right. Was Mr. Wright's copy of his driving record among the documents you do recall?

A No, I don't recall.

Q How about a book with job listings that Mr. Wright had with him, was that among the documents you remember being transferred to you?

A I don't recall.

Q Okay. By the way, at the point where the arrest took place, was that near the business location of Carroll Fuel Company?

A I don't know where Carroll Fuel Company is located.

Q Okay. Now I think you told us at the outset of your testimony that you work with the Drug Enforcement Administration?

A Yes.

Q On any occasion prior to September 14, 2004, did you have the opportunity to work with the vehicle that Mr. Saffell, the C.I. or the C.S., was working with that day?

A Yes.

[204] Q All right. And have you been involved in investigations involving that vehicle in which surreptitious recordings were made from within the vehicle?

A Yes.

Q All right. Did you review the videotape that was made in that vehicle on September 14, 2005?

A Yes.

Q All right. And did you notice that the date stamp was wrong on it?

A Yes.

Q Did you notice that the time stamp was wrong on it?

A Yes.

Q Have you ever seen that occur in other cases that you've been involved with involving that vehicle?

A Yes.

Q Okay. And on how many occasions roughly? I mean I don't need a—

A Approximately four or five occasions.

Q Okay. And on those four or five occasions, what if anything did you do to fix the situation?

A After the first occasion, I tried to fix it myself. But I have a hard time with like VCR-type equipment and I couldn't fix it and wasn't able to then fix it or do anything additional with regards to the date time stamp.

Q Okay. On prior occasions, had you noticed that the [205] angle at which the camera was aimed in that vehicle was, did not tend to show the passenger seat person's face?

A No. On prior occasions, I hadn't noticed that.

Q Okay. Did you notice in reviewing the tape from this case that the passenger seat person's face was generally obscured or not within the field of vision?

A Yes.

Q And I think I asked you those questions relating to occasions prior to September 14th. Have you worked with that vehicle since September 14, 2004?

A Yes.

Q And have you observed the same problems that we just talked about?

A No. After we reviewed the tape in this case, we realized that somehow the device had been altered or damaged. It seems like maybe someone had accidentally hit it or whatever. So we had the technician work on it and then fix the problem.

Q Okay. If you'll bear with me one second, I think I'm close to being done. Did you physically observe and I guess that's not quite possible, but did you actually see anybody hand crack cocaine to anybody else within the confines of the vehicle that you were keeping an eyeball on?

A No.

Q All right. You say after you observed the mistakes on this tape and the problems on the tape in this case, you went to the technicians to get it fixed.

I'm talking again about the vehicle and apparently everything is A-okay now. Correct?

A I don't know if it's A-okay today because equipment can always break. But afterwards, it was improved or it showed more of the passenger side.

Q Other than your personal inability to fix this equipment that you testified you tried to, but you're bad with VCRs, what if anything to your knowledge was done on the prior occasions, on the occasions prior to September 14th, the four or five occasions when you had observed these problems, what to your personal knowledge was done to address it or fix it on those occasions?

A With regards to the date time stamp?

Q Or any other problems. Yes. The date stamp I think is what we were talking about.

A With regard to the date time stamp, I think that whatever reason, it was not fixed so it wasn't corrected. I'm not sure. I think it has to do with if the car loses power even if it's fixed, it's like a VCR, but loses power, it loses the date time stamp. So I think that it's kind of like an ongoing problem that it reoccurs with an older vehicle if it loses power and has to be—it loses battery power. I think they have to jump start it. It's like a VCR where you have to constantly fix it.

MR. BOURGEOIS: Okay. I've no further questions. Thank you.

THE COURT: Thank you, Mr. Bourgeois. Any follow up on that, Mr. Wallner?

MR. WALLNER: No, Your Honor.

THE COURT: All right. Thank you very much, Agent Flickinger. You may step down. Sir, there is a sequestration order in effect in this case. So you

should not discuss your testimony with anyone in the event that you're called back to the witness stand.

THE WITNESS: Okay. Thank you.

THE COURT: All right. Thank you very much.

MR. WALLNER: Your Honor, the Government will call Special Agent Troy Wilson.

THE COURT: All right. Thank you, Mr. Wallner.
THE CLERK: Please raise your right hand.

(Witness sworn.)

THE CLERK: Please be seated. Please speak directly into the microphone. State your full name for the record and spell your last name, please.

THE WITNESS: Special Agent Troy Wilson. W-I-L-S-O-N.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. WALLNER:

Q Special Agent Wilson, can you tell the ladies and gentlemen of the jury your responsibilities as a special agent with the Drug Enforcement Administration?

A Sure. We target and investigate drug trafficking organizations and attempt to dismantle and disrupt their activities.

Q How long have you been a member of the Drug Enforcement Administration?

A Approximately five years.

Q I'd draw your attention to September 14th of 2004. Were you working that day?

A Yes, I was.

Q And could you explain to the ladies and gentlemen of the jury what if anything, what if any responsibilities you had with regard to a controlled purchase of 50 grams of crack cocaine?

A I was a member of the surveillance team that day.

Q Were you part of what has been come to be called the rotating eye?

A Correct.

Q And can you explain to the ladies and gentlemen of the jury what if anything you observed during your time as the surveillance eye?

A I observed the informant operating the undercover vehicle. I observed at some point it was the passenger that was in the seat with the informant.

Q Do you know who that passenger is?

A Yes, I do.

Q Who was that?

A It's Mr. Wright.

Q And do you see Mr. Wright in the courtroom?

A Yes.

Q Can you identify him for me, please?

A Sure. He's the gentleman seated at the defense table with the white shirt.

MR. WALLNER: Your Honor, for the record the witness has identified the defendant, Mr. Wright.

THE COURT: The record will so reflect.

Q During the course of your surveillance, how many times would you say you had the eye?

A Several. Four to six times.

Q And about how long did this surveillance take?

A It was a long one. It was probably a little over an hour.

Q And during the time period, what if anything was transpiring? What were you doing as a result, as part of the surveillance team?

A I was—again we were following the vehicle for this entire time and it was a rotating, depending on the turns the vehicle would make and the locations that it would go to, the surveillance team would rotate as to who would see, move up so that the people in the vehicle would not see the same, you know, cars in their rearview mirror or see them over and over again. So it was constant rotation. And several times during that surveillance, I was the closest vehicle to the undercover vehicle and was able to observe different things.

Q During the time you were the surveilling officer, could you tell the ladies and gentlemen of the jury how many people you observed in the vehicle?

A Eventually, there were three people in the vehicle.

Q And during the time period starting with the first time you observed it, how many people were in the vehicle?

A Just two.

Q And who were they?

A The informant and Mr. Wright.

Q Did you know who you were looking for when you were observing Mr. Wright?

A We were provided with a photograph before we did the surveillance or did the buy. So I knew from the photograph and then, you know, after seeing the vehicle, following it for so long, I was able to see the person that was in the passenger seat and, you know, it was, very closely resembled the photograph.

Q The individual that you observed, approximately how many different times did you observe him in the vehicle?

A Again, you know, at least four to six times. You know, depending on various locations that the vehicle went to and various turns that it would make, at some point, you know, I would pass it. If it was a two-lane road, I even passed it going in the opposite direction. I passed the vehicle when it was parked and Mr. Wright was outside of the vehicle. So different positions, different times during the surveillance.

Q You indicated at one point you actually passed the vehicle and Mr. Wright was outside the vehicle. Do you recall where you were when you observed that?

A It was a convenience store. I don't recall the name, the exact name of the store.

Q Do you know where it was located?

A It was, I believe it was on Harford Road. I don't know the exact intersection.

Q During the remainder of the surveillance, you indicated at some point there were three people in the car. Is that correct?

A That's correct.

Q Explain to the ladies and gentlemen of the jury what you observed with regard to this third person.

A Toward the end of the surveillance, what was called out over the radio was that a third individual had gotten into the back seat of the undercover vehicle. We followed that vehicle directly to a street. I believe it was Hillsway. And when that vehicle parked on that street, when the undercover vehicle parked there, I observed a black male wearing a white t-shirt exit out of the back seat and walk up the street and then at some point later, I saw that same person get back into the back seat of the vehicle.

Q Do you know the lapse in time between the individual exiting and the individual returning?

A Not exactly. Approximately 10, 15 minutes maybe.

Q During that time period, did you ever learn the identity of the individual who had gotten in the back seat of the vehicle?

A Later I did. Yes.

Q Who was that?

A It was Mr. Couther.

MR. WALLNER: Court's indulgence, Your Honor. I have nothing further.

THE COURT: Thank you, Mr. Wallner. Mr. Bourgeois?

MR. BOURGEOIS: Very briefly.

CROSS-EXAMINATION

BY MR. BOURGEOIS:

Q Agent Wilson, did you participate in the arrest of Mr. Wright?

A Yes.

Q And do you understand that no money was recovered from him?

A That's my understanding. Yes.

Q And no money was recovered from Mr. Couther at the time of his arrest?

A There wasn't a large sum recovered. I know that.

Q Well, the serialized government funds that were used in this operation were not recovered from Mr. Couther. You understand that?

A Yes. Correct.

Q And you understand that serialized authorized government funds were not recovered from Mr. Wright either. Correct?

A Correct.

Q And I went very briefly over this with one of your colleagues, but I just want to read you a number of names. And can you confirm to me whether or not

they also constituted separate parts of this roving eye. Okay? Special Agent John Flickinger.

A Yes, he was there.

Q Special Agent Joseph Rosati?

A Yes.

Q Sergeant Thomas Smith?

A Yes.

Q Task Force Officer Byron Scott?

A Yes.

Q Task Force Officer Matt Glassman?

A Yes.

Q Duane Crawley?

A Yes

Q John Jendrek?

A Yes.

Q Anybody else that you can recall?

A Not that I recall. No.

Q All right. At the convenience store you testified to a few moments ago, was that the Baba Johnny Convenience Store?

A Again, I don't recall the exact name of it.

Q All right. You saw Mr. Wright outside of the vehicle?

A Correct.

Q Did you also see Mr. Saffell outside of the vehicle on that occasion?

A Who's that?

Q That's your confidential source.

A I don't believe I did. No.

Q All right. Well, when you passed that convenience store, did you have a clear enough vision to see inside of the passenger compartment of the vehicle?

A Yes.

Q Did you see your confidential source, Mr. Saffell, inside the vehicle at that time?

A I believe he was.

Q Okay. Did you see that vehicle stopped at any other locations?

A Yes.

Q All right. Did you see the vehicle stopped outside of the Prima Foods Store off Erdman Avenue?

A I don't recall the exact name of the store, but I know there were other stops and I do remember there was some type of store, but I don't recall the name of it.

Q All right. On any of those occasions, when that vehicle was observed by you stopped at some location, did you ever see Mr. Saffell, the confidential source, leave the car?

A I didn't. Not that I recall. No.

Q Okay. Do you know where the Carroll Fuel business location is in Baltimore City?

A Not off the top of my head. No.

Q Do you recall that Mr. Wright was arrested at or near Carroll Fuel's business location?

A I don't remember that business. No.

Q Did you see any of the documents or personal effects that were removed from Mr. Wright at or after the time of his arrest?

A If I did, it would have been very briefly.

Q Okay. Do you recall whether or not his resume or driving record or commercial driver's license or anything like that were among the materials you may have seen?

A I don't recall exactly what he had on his person.

Q Does any of that sound familiar at all even if you don't have an exact recollection?

A I'm sure he had identification on him, some other documents. But exactly what the paperwork was, I don't recall.

Q All right. Do you recall who particularly arrested and/or searched Mr. Wright's person at the time of his arrest?

A There were several of us that were there when we placed him under arrest, but I don't recall specifically who searched him. No.

Q Well, can you remind us who was there at the time of his arrest?

A Of course, myself, Special Agent Flickinger I believe was there, Special Agent Rosati. At some point, I believe Task Force Officer Jendrek was there. I don't recall if he was there initially or if he, I think he may have showed up just a few seconds after the fact or as we were making the arrest. I know there were probably one or two other people, but I don't recall who they are.

MR. BOURGEOIS: I have no further questions for you, sir. Thank you.

THE COURT: Thank you, Mr. Bourgeois. Anything further, Mr. Wallner?

MR. WALLNER: No redirect, Your Honor.

THE COURT: You may step down, Special Agent Wilson. You should not discuss your testimony with anyone, sir, in the event that you are called back to the witness stand. There's a sequestration order in effect in the case.

THE WITNESS: Yes, sir. Thank you, Your Honor.

THE COURT: Thank you very much. Why don't you all approach the bench, please?

(Bench conference:)

THE COURT: You want to take a break now?

MR. WALLNER: I think it seems appropriate.

THE COURT: Saffell is the next witness?

MR. WALLNER: Yes.

THE COURT: All right. Now, Mr. Bourgeois, with respect to—well, first of all, as to the tape, clearly, there still has to be a foundation established. The foundation was established with the tape at the pretrial hearing. There still has to be a foundation of the tape still has to be established before the jury unless you agree to the authenticity and foundation of the tape.

MR. WALLNER: Well, I was going to actually authenticate it as the last witness if that's okay.

MR. BOURGEOIS: Conditional.

THE COURT: You don't need to go through the process of authenticating the tape relating to foundation for the tape prior to Saffell testifying?

MR. BOURGEOIS: Based upon the proffer that Detective Crawley will be testifying and assuming he'll testify consistently with yesterday, I have no objection. I would reserve in case something unforeseen were to happen like he were to change his story—

THE COURT: I'm just trying to see if we can cover that before Saffell testifies.

MR. WALLNER: I think Detective Crawley may be a witness a little lengthier than anybody else and I do think that it may be appropriate that Mr. Bourgeois would have some significant cross-examination of him to finish the case as opposed to—

THE COURT: All right. Well, then we're not going to have to deal with the foundation issue—

MR. WALLNER: Correct.

THE COURT: —authentication issue at this time. We'll just go right to Saffell with the tape. Correct, Mr. Bourgeois?

MR. BOURGEOIS: I think that's appropriate.

THE COURT: All right. Now with respect to the—I indicated when I denied your motion in limine with respect to Saffell's testimony, that I would give a cautionary instruction at that time, noting that it's strictly being offered in the context of the relationship of Saffell and Mr. Wright in connection with the charges in this case and it's not to be viewed in any other context other than the relationship that existed between Wright and Saffell. And your objection is still preserved as to the testimony of Mr. Saffell. Is that a satisfactory explanation to the jury as far as you're concerned?

MR. BOURGEOIS: I would simply ask that you add simply Mr. Saffell's credibility, like everything else he says, it's for you to decide.

THE COURT: Well, I'm not going to comment on any witness—

MR. BOURGEOIS: I know.

THE COURT: So I'm not going to do that—

MR. BOURGEOIS: Your proposal is satisfactory, Your Honor.

THE COURT: All right. Then I'll do that right now. Then we'll break for lunch.

MR. WALLNER: Very well, Your Honor.

THE COURT: Okay. Thank you.

MR. BOURGEOIS: Thank you.

(In open court:)

THE COURT: Ladies and gentlemen, the next witness to testify will be Mr. Saffell and he'll testify in conjunction with a videotape. I want to advise you now that Mr. Saffell's testimony is being offered purely in the context of his relationship with Mr. Wright, the defendant in this case, in connection with the specific charges in this case relating to on or about September 14, 2004. They're not being offered in the context of any other charges and should be merely accepted by you—you view his testimony with respect to the context of the relationship between Mr. Saffell and Mr. Wright and in no other context. So I just wanted to advise you of that and we will be hearing from Mr. Saffell immediately after lunch with the videotape. So we're going to take our lunch break a little earlier today. So we will adjourn for lunch and be ready to start again at 1:30.

(Proceedings concluded.)

I, LISA K. BANKINS, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ illegible ____
Signature of Court Reporter/ Date
Transcriber

/s/ LISA K. BANKINS
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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Criminal Docket No. RDB-05-0078

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES WRIGHT,
Defendant.

Baltimore, Maryland
September 13, 2005
1:32 PM to 5:00 PM

The above-entitled matter came on for a jury trial before The Honorable Richard D. Bennett

APPEARANCES

On Behalf of the Plaintiff:
James T. Wallner, Assistant U.S. Attorney

On Behalf of the Defendant:
John Augustine Bourgeois, Esquire

ALSO PRESENT

Special Agent Dwayne Crawley

Transcribed by: Martin Giordano, RMR, CRR

[2] AFTERNOON SESSION

SEPTEMBER 13, 2005

(The following colloquy took place out of the presence of the jury.)

THE COURT: Just out of an abundance of caution, and I address this to Mr. Bourgeois, since his defense is largely one of ineptness and lack of proper operation of equipment, one of the things that concerns me is as we proceed through this redacted tape there are going to be periods where several minutes at some points, or even stall periods, are blotted out where all you see is snow, and my concern is the jury might perceive that largely based on the defense is an ineptness in the operation of the equipment. I don't know exactly how to couch that in terms to the jury, something they can't or not allowed to see, something they shouldn't concern themselves with. The equipment is operating properly. These are portions that were redacted.

MR. WALLNER: These are portions that were redacted.

THE COURT: Correct.

MR. WALLNER: And they were redacted for obvious reasons—

THE COURT: At the request of the defendant.

MR. BOURGEOIS: Right. I would suggest, Your Honor, perhaps the way to do it since we are going to go through the tape as it is, it might just be at that point either you or[3] even Mr. Wallner could say now at this point we see an interruption and that was done at the direction of the Court.

THE COURT: I don't have to keep doing it each time. I am just going to indicate there are portions of the tape that are redacted. We tried to shorten it as best we can, so the periods of the gap where it's been

redacted is because it is material that is not necessary for your consideration

MR. WALLNER: That's fine, Your Honor.

MR. BOURGEOIS: That's fine.

THE COURT: I didn't want the perception being there was some—

MR. WALLNER: That's fine.

THE COURT: On the matter of scheduling, I have a sentencing tomorrow that is going to take some time. My thought is that it's very likely that we will not sit a whole day tomorrow and we will then proceed again Thursday morning. I believe the case can conclude on Thursday in that fashion. Any problems from the point of the government?

MR. WALLNER: I don't have a problem with my schedule, but I do know at least one of the jurors I recall—

THE COURT: Don't worry about it. There's one juror we will deal with an employment problem.

MR. WALLNER: Correct.

THE COURT: In fact, she was just worried about being docked a day's pay as I recall. She was allowed to miss [4] three days but not four. We will deal with that.

Any problem from the point of view of the government.

MR. WALLNER: No.

THE COURT: Mr. Bourgeois, any problem from your point of view.

MR. BOURGEOIS: No, sir.

THE COURT: Fine. We'll handle that. And, Ms. Moye, I think what I will do is I will indicate that to the jury now, and I will mention that, and that one juror, you can follow up with at the end of the day because I suspect what we are going to do is start early tomorrow morning and then finish sometime, we may finish and have a later lunch and finish for the day because tomorrow I have a sentencing which can take some time. Thursday morning?

MR. WALLNER: I would hope, Your Honor, that we would conclude the evidence tomorrow.

THE COURT: You probably will, but I still couldn't go over instructions and have you do closing argument tomorrow afternoon, but I was thinking maybe just pushing this off, that we could easily do that and the case could conclude and be in the jury's hands by lunch time Thursday perhaps.

MR. WALLNER: I believe so.

THE COURT: We'll just have to wait and see. Bring the jury in and I will talk to the jury about this.

[5] (The jury then returned to the courtroom.)

THE COURT: Good afternoon. You all may be seated. Many times, as I said before, we save time by dealing with certain matters. Sorry about eight minutes late getting started, but there was a reason to shorten some matters.

First, on the matter of scheduling, it appears due to my schedule, not due to any part of the lawyers, there are matters that have come for me tomorrow afternoon which I think will necessitate our starting very promptly tomorrow morning at 9:15, 9:30 as best we can and then going up to lunch time and maybe not sitting after lunch tomorrow, but the case would then

very likely proceed to Thursday morning and then everyone believes we would close by Thursday at lunch. That's the anticipation. I am not holding the lawyers to that. I am just telling you how I think it will play out.

Now, at least one of the jurors had indicated a difficulty with an employer who apparently provides three days for jury service but not a fourth. We have dealt with these situations before and employers have been known to be let us say very cooperative if a Federal Judge sends them a note, and I will certainly do that to emphasize the citizenship of their employee and not issue a Federal Court Order but certainly urge that employer to be considerate of the act of citizenship of their employees.

My suggestion is you talk to Ms. Moye about that at[6] the end of the day, and I will take whatever steps I can, and I think I have done that in the past, and employers will generally respond and say thank you very much, and I think on one occasion I actually spoke to an employer on the telephone and we worked it out. So, don't worry about that.

I think that will probably be the schedule that I anticipate. We certainly are going to go today to probably almost 5 o'clock and we will start promptly tomorrow morning, but then it's very likely tomorrow afternoon you may not be sitting. I certainly won't call the other employers. They don't need to know you're not here. That's your business in terms of that. It's supposed to be a beautiful day tomorrow apparently, so we will have to wait and see, but that is the scheduling matter I am dealing with.

The second matter I wanted to discuss with you is we are about to have a witness and a videotape being

played in connection with the testimony of that witness. There are portions of the tape that have been redacted because those matters really do not involve themselves with the evidence in this case. So, portions have been redacted down and counsel have worked together in that regard and that's the reason you may see certain gaps because certain items have been taken out and the lawyers agreed to that, so that is the reason for that.

Is there anything further on that matter, [7] Mr. Wallner.

MR. WALLNER: No, Your Honor.

THE COURT: Mr. Bourgeois.

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. Good. I think we are ready to start.

MR. WALLNER: Your Honor, the government calls Jeffrey Saffell.

THE COURT: Just a moment, please. Mr. Wallner, Mr. Bourgeois, why don't you come to the bench for a second.

(The following colloquy then took place at the bench.)

MR. WALLNER: (Unintelligible) thin mistake (unintelligible) morning as I made more (unintelligible) in terms of ever (unintelligible) with a tape, which obviously will be part of the court record. Most judges do not require reporters to try to put down the actual tape itself in terms of what is being said.

The entire tape will be in evidence. It will be part of the record. So, Mr. Bourgeois, (unintelligible) on the tape.

MR. BOURGEOIS: She would be super human. I see no need to put her through that ordeal.

MR. WALLNER: (Unintelligible).

(The following took place in open court.)

[8] THE COURT: Alright, counsel, the witness will be sworn.

JEFFREY SAFFELL

WAS DULY SWORN TO TELL THE TRUTH

DIRECT EXAMINATION

BY MR. WALLNER:

Q. Mr. Saffell, can you tell the ladies and gentlemen of the jury how old you are, sir?
A. Thirty.
Q. Are you married or are you single?
A. Single.
Q. Do you have any children?
A. Two.
Q. What are they?
A. Two daughters.
Q. Their ages?
A. Four and 14.
Q. Do you support these children, sir?
A. Yes, sir.
Q. What kind of job do you have?
A. Servpro in Glen Burnie.

THE COURT: Would you keep your voice up, sir. Speak into the microphone, and speak very clearly into the microphone.

THE WITNESS: Yes, sir. Servpro in Glen Burnie.

[9] BY MR. WALLNER:

Q. What do you do for them?

A. Fire and water damage.

Q. How long have you held that job?

A. Approximately three months.

Q. Prior to that job, sir, how did you support your children?

A. Working at Canton Marine Terminal.

Q. Anything else?

A. Before that I was a drug dealer.

Q. Tell the ladies and gentlemen of the jury how you became involved and became a drug dealer.

A. Just pretty much buying like small quantities of cocaine and breaking them down to smaller and selling them, maybe tripling my money.

Q. Is there a term you use for that, sir?

A. Yeah, flipping.

Q. How long have you been involved in the drug trade, sir?

A. Approximately since I was 13.

Q. Since you have been involved with the drug trade, do you have a criminal record, sir?

A. Yes, sir.

Q. What is it?

A. Distribution, you know, cocaine, manufacture and distribute.

[10] Q. Have you served any time in jail, sir?

A. Yes, sir.

Q. What is it? How long did you serve in jail?

A. Seven years and three months.

Q. When were you actually released from jail for your period of incarceration for seven years?

A. Approximately June of 2000.

Q. When did you eventually become a confidential informant, sir?

A. 2002 I was picked up on a wiretap case.

Q. During that time period you signed a cooperation deal with the police; is that correct?

A. Yes, sir.

Q. Let me show what I have as Government's Exhibit Number 1. Do you recognize this, sir.

A. Yes, sir, I do.

Q. What is it?

A. That is my plea agreement.

Q. Can you tell the ladies and gentlemen of the jury the date you signed that plea agreement?

A. It says 6-10-03 on the paperwork.

Q. I'm sorry, the date is 6-10-03?

A. Yes, sir.

Q. And what were the terms of that agreement when you signed it? What were you supposed to do and how long of a sentence [11] would you receive if you cooperated?

A. Well, if I cooperated with certain cases that I would receive a 10-year sentence, all suspended but two years home detention.

Q. And as a result of that, what were you supposed to do when you said cooperate in certain cases? What kinds of things were you asked to do?

A. Pretty much make buys for authorities and, you know, pretty much the connect to make sure that we bought drugs and stuff.

Q. When you say connect, what do you mean by that?

A. The people we buy drugs from.

Q. In some respects, did you keep your end of the bargain with that plea agreement?

A. No, I have not.

Q. Can you tell the ladies and gentlemen of the jury how you violated the agreement?

A. By a search and seizure warrant was done on my house and a half an ounce of powder cocaine was found.

Q. Where was that, sir?

A. In Colgate in Baltimore County.

Q. Were you involved in anything else with regard to the production of drugs?

A. Yes.

Q. What was that?

[12] A. There was, on the case—there was an Ecstasy case at that time.

Q. Did there come a time when you were told by law enforcement that you had violated the terms of your agreement?

A. Yes.

Q. And what if any promises were made to you with regard to your testimony or continued cooperation?

A. It was none.

Q. Are you still scheduled to be sentenced in that case that you signed the cooperation agreement on, which is Exhibit Number 1?

A. Yes, sir.

Q. Do you have a scheduled sentencing date?

A. Yes, sir, October 17, 2005.

Q. Do you know what the recommendation of the State's Attorney will be for Baltimore City? The State's Attorney for Baltimore City, what her recommendation will be at the time of your sentencing?

A. A flat 10-year sentence.

Q. With the exception of the 10-year sentence that you will receive, were you prosecuted for your involvement in the Ecstasy case?

A. No, I was not.

Q. Did you receive any consideration for the case where you were arrested in Baltimore County?

[13] A. No.

Q. No, you didn't receive any consideration?

A. Oh, yes, consideration.

Q. What happened?

A. Well, they said from the plea agreement that I agreed to not get in trouble that they could have locked me up right there and had a retake warrant to lock me up, and they said if I cooperated that they will just let me, wouldn't arrest me at that moment but I still have to go to court and face my 10 years, though.

Q. Sir, are you receiving any consideration for your testimony here today?

A. I hope.

Q. What does that mean?

A. I mean just saying that I did, you know, cooperate with law enforcement that they might take that into consideration.

Q. Who would take that into consideration, sir?

A. The judge handling my case for this plea agreement.

Q. You are aware, sir, are you not, that there will be no change in the recommendation from the State, correct?

A. Yes, sir.

Q. So, your cooperation here today, at least in terms of the government and the State is not going to change, correct?

A. Yes.

Q. So, on—I'm sorry, the date was what, the date of your [14] sentencing?

A. Oh, October 17th.

Q. So, on October 17th, you know that the State prosecutor will go into court and recommend 10 years?

A. Yes, sir.

Q. Despite your testimony here today?

A. Yes, sir.

Q. Do you know the defendant, sir?

A. Yes, sir.

Q. How do you know him?

A. I met him through a friend of mine.

Q. How long have you known him?

A. Approximately two years.

Q. Prior to September 14, 2004, had you ever received drugs from him in the past?

A. Yes.

Q. Can you tell the ladies and gentlemen of the jury how you would go about obtaining these drugs?

A. I used to call a cell phone and it got turned off, and then I called his house where he lived at.

Q. Do you know where that is?

A. It was on Madison Street.

Q. On September 14, 2004, did you make arrangements to purchase drugs from the defendant?

A. Yes, sir.

[15] Q. Can you tell the ladies and gentlemen of the jury how you made these arrangements?

A. I called him at his house.

Q. Was that call recorded in any way?

A. Yes, sir.

Q. Who directed you to make that telephone call?

A. Detective Sergeant Thomas Metz.

Q. Once you made the telephone call, what if anything did you do?

A. Set up a time when I was to come over and pick him up.

Q. What happened next?

A. Then once I picked him up, he placed a call from my cell phone to try to purchase what I wanted.

Q. What exactly did you ask to purchase, sir?

A. Two ounces of hard.

Q. When you say hard, what do you mean?

A. Crack cocaine.

Q. Crack hard is a term for crack cocaine?

A. Yes, sir.

Q. Prior to picking up Mr. Wright, were you provided anything by law enforcement?

A. Yes.

Q. What?

A. The vehicle that I was driving and the money I used to purchase the drugs.

[16] Q. How much money were you provided?

A. $2,000.

Q. Did anyone search you to make sure you were not carrying any contraband?

A. Yes, sir.

Q. Aside from that, were you provided anything to go along for the ride?

A. Yes, sir.

Q. What were you provided?

A. Actually it was a scale.

Q. What kind of scale?

A. A digital scale.

Q. What was the purpose of being provided a digital scale?

MR. BOURGEOIS: Objection, Your Honor.

THE COURT: Overruled.

A. Just to throw off the person by weighing it, I was really concerned about how much it is.

Q. Explain to the ladies and gentlemen of the jury why it would be important for you to know the quantity of drugs you are purchasing such as you would need a scale.

A. Because just to make sure that we are getting exactly what is being paid for.

Q. Who provided you the scale?

A. Dwayne.

Q. You mean Detective Crawley?

[17] A. Yes.

Q. In the courtroom here with me?

A. Yes, sir.

Q. Once you were provided this information, where did you go? After you were given everything, where did you go?

A. I went to his home to pick him up.

Q. Did you pick him up?

A. Yes.

Q. Did he get in your car?

A. Yes.

Q. What happened next?

A. He placed a call immediately.

Q. To who?

A. One of his sources.

Q. When you say source, what do you mean?

A. One of his connects.

Q. When you say connect, what do you mean?

A. The person that he purchased drugs from.

Q. Once this telephone call was placed, what happens?

A. Then the first person he contacted, he gave us a time limit.

Q. What do you mean a time limit?

A. Told us to call back in like 20 minutes.

Q. What happened next?

A. So, we drove to a convenience store on Harford Road.

[18] Q. Then what happened?

A. Then we bought cigarettes and a soda. Then he called him again and it was going to be longer, so we agreed on him to call somebody else, another one of his connects.

Q. Okay. Was that for the purchase of the same amount of drugs?

A. Yes, sir.

Q. How much were you planning to purchase these drugs for?

A. For $1,000 an ounce for a total of $2,000.

Q. Based upon your experience in narcotics trafficking, is that an appropriate amount for an ounce of crack cocaine?

A. What $1,000?

Q. Yes.

A. Yes, sir.

Q. Once this additional call was placed, what happened?

A. Then it was put off again and, yes, only this time the guy was supposed to call us back on my cell phone.

Q. Did that occur?

A. Later on.

Q. What happened?

A. He had to go to a place for a job application.

Q. He. Who are you talking about?

A. The defendant on my left.

Q. You are talking about Mr. Wright?

A. Yes, sir.

[19] Q. He had to go where?

A. To a place for a job application, a truck driving place.

Q. Did you take him there?

A. Yes, sir.

Q. What happened?

A. He was in—he was pretty much in and out.

Q. Were you eventually able to consummate a deal?

A. At that time, we was waiting on a phone call still.

Q. What happened?

A. Then he placed a call back to the guy and we went somewhere towards—I don't know. It's been awhile. My memory is not that sharp, so, I know it was towards the place where we went to that convenience store to get the cigarettes from, and there was a guy there that we met, but at the time he

didn't want to deal because there was too many, too hot he said.

Q. When you say too hot, what do you mean?

A. It was police around like patrolling neighborhoods and all that.

Q. So, what happened next?

A. So, he called his other connect and put the order in for the two ounces and he told us to meet him up by his way.

Q. Which is where?

A. I'm not sure of the exact—I just remember he directed me the whole way up.

[20] Q. He, who?

A. The defendant on the left of me.

Q. What happened next?

A. And we went up there to meet this guy.

Q. Did you ever meet him?

A. Yes.

Q. What happened?

A. Well, he got into the back of the truck and I handed him the money and I was thinking that he was going to hand it to me, but he started to get out and that's when the defendant told me he had to go get it from his house.

Q. Why did you think he was going to hand it to you as soon as you gave him money?

A. Because that's the way it's supposed to happen, you know, fronting no money beforehand.

Q. When you say that's the way it's supposed to happen, what are you talking about?

A. That no money is supposed to be fronted up front.

Q. By whom?

A. By me. For law enforcement, you're not supposed to front no money out.

Q. Why is that, do you know?

A. Because it's always a chance they might rip you off and not show up or disappear, especially with that kind of money, $2,000.

[21] Q. You provided $2,000 to who?

A. To the—I forgot his name.

Q. The other Individual?

A. Yes.

Q. Not to Mr. Wright, correct?

A. Yes, sir.

Q. You indicated he started to get out of the car, correct?

A. Yes.

Q. What happened next?

A. Then I turned around and like, what's going on, and he said, the defendant on my left told me he had to go get it from his house.

Q. You said the defendant on your left. You mean in the courtroom here today, correct?

A. Oh, yes.

Q. So, what happened next?

A. Then he got out and walked up the street.

Q. Did there come a time when he came back?

A. Yes.

Q. What happened?

A. When he came back, he jumped in and we drove to another location. Then he got out and left again. Then he came back, and when he came back, he had the drugs on him.

Q. What happened next?

A. Then I remember turning around and he handed the drugs to [22] the defendant on my left right here.

Q. Mr. Wright?

A. Mr. Wright.

Q. Then what happened?

A. He looked at it and then he handed it to me and I looked at it then I put it right away.

Q. You say you put it right away. What did you do with it?

A. I put it inside my boxer briefs, in the front of the boxer briefs.

Q. After you put the drugs in your person, what happened next?

A. Then they told me to drive them to a place. I don't even really remember.

Q. Did you used to live in this area where you were?

A. No, sir.

Q. So, where did you go?

A. Somewhere, I think it was somewhere towards the Harford Road area, but right before there.

Q. What happened?

A. And they just told me to pull over and let them out there.

Q. What happened next?

A. Then I left them out and I pulled off. I was going back to where we were supposed to meet up.

Q. When you say you were supposed to meet, you mean law [23] enforcement?

A. Yes.

Q. Once you met law enforcement, what did you do?

A. Once I met them, they recovered the two ounces from me, then they pat me down to make sure I didn't have nothing on me.

Q. Anything else?

A. Yes.

Q. What?

A. Any drugs or U.S. currency, anything.

Q. Were you aware on September 14, 2004, that the vehicle in which you were riding in had a video cassette recorder inside of it?

A. No, sir.

Q. Have you since September 14, 2004, had the opportunity to view any of the videotape that eventually was taken from that vehicle?

A. No, sir.

Q. You have not?

A. No.

THE COURT: Ladies and gentlemen, these transcripts are being provided to you to assist you in reviewing the tape. These transcripts will not be items in evidence. They are being provided to assist you. This is the version, the government's version of what is being said on the tape. It is [24] your recollection that controls. To the extent that you take notes with respect to the playing of this tape, you should take notes on your own personal note pads that you can use for deliberations, but do not write on the transcripts because the transcripts will not be going back into the jury room with you during deliberations, and the transcripts are not in evidence. And to the extent you listen to the tape, your recollection controls if what you hear is different from what is stated on the transcript.

You may continue, Mr. Wallner.

MR. WALLNER: I am going to show you what has been marked Government's Exhibit Number 3. That's for you to follow along.

THE COURT: Government Exhibit 3 is the transcript, Mr. Wallner.

MR. WALLNER: That's correct, Your Honor.

THE COURT: All right. That will be marked just for identification. It will not come into evidence.

MR. WALLNER: Thank you, Your Honor.

(The transcripts were then distributed to the jurors.)

(The tape was then played.)

BY MR. WALLNER (continuing):

Q. Is that your voice, sir?
A. Yes, sir.
[25] Q. You indicated in what appears to be a telephone call, you said, all right, I'm out front?
A. Yes.
Q. Who are you speaking to?
A. To the defendant, Mr. Wright.
(Playing of the tape was then resumed.)
Q. Where are you located when you are doing this?
A. Just past Patterson Park Avenue, on Madison Street.
(Playing of the tape was then resumed.)
Q. The individual you were speaking to at that time, who was that?
A. Mr. Wright.
Q. And then was an individual in the videotape exiting the house. Who exited the house? Who was that?
A. That's Mr. Wright.
(Playing of the tape was then resumed.)

BY MR. WALLNER (continuing):

Q. Right there Mr. Wright asked you something. What did he ask you? Follow in the transcript.
A. Okay, I have it. I was into watching the video.

MR. WALLNER: I will rewind the tape.

(Playing of the tape was then resumed.)

Q. Do you hear that? What are you trying to do?
A. I couldn't pinpoint it with this transcript.
(Playing of the tape was then resumed.)
[26] Q. Right there you said—
A. Trying to get two hard.

Q. What are you saying to Mr. Wright at that particular point in time?

A. I was trying to get two of hard, two ounces of crack cocaine.

Q. When you say hard, you're talking about crack cocaine; is that correct?

A. Yes, sir.

(Playing of the tape was then resumed.)

BY MR. WALLNER (continuing):

Q. Did you follow along?

A. I'm still trying to—

Q. Mr. Wright says to you, looking at the transcript—

MR. BOURGEOIS: Your Honor—

THE COURT: Would you approach the bench.

(The following colloquy then took place at the bench.)

MR. BOURGEOIS: (Unintelligible) when he says he's listening and can't hear something (unintelligible) look up (unintelligible) what did you say.

THE COURT: The objection is sustained, Mr. Wallner. This (unintelligible) can look at (unintelligible) listen to transcript, look at television (unintelligible) follow questions asked (unintelligible).

[27] MR. WALLNER: No.

THE COURT: The process (unintelligible).

MR. WALLNER: Okay. Yes, Your Honor.

MR. BOURGEOIS: Thank you, Your Honor.

(The following then took place in open court.)

THE COURT: Thank you, counsel.

Mr. Saffell, you are going to look at the TV monitor and you are going to look at the transcript.

THE WITNESS: Okay.

THE COURT: And you are going to pay attention. Do you understand?

THE WITNESS: Yes, sir.

THE COURT: So, you look at the transcript. It's right in front of you. Do you need reading glasses, sir?

THE WITNESS: No, it's not that. I actually couldn't hear.

THE COURT: Do the best you can. You have the transcript there. It was proffered by the government. Turn this TV somewhat, and you will need to—

THE WITNESS: Just up a little bit more.

THE COURT: We will turn the volume up a little bit more, and you will have to listen carefully and look at the transcript.

THE WITNESS: Okay. Yes, sir.

THE COURT: You can see it there. Is there any [28] difficulty in you seeing that?

THE WITNESS: I can see it. If the hearing would match up with the transcript.

THE COURT: You're going to have to hear and do the best you can.

THE WITNESS: Yes, sir.

THE COURT: All right. Go ahead, Mr. Wallner.

MR. WALLNER: Your Honor, with the Court's indulgence, I will rewind it to where it was. I will just rewind it to where I'm talking about.

(Playing of the tape was then resumed.)

BY MR. WALLNER (continuing):

Q. Do you see that part, sir, and did you hear that part now?

A. Yes, sir.

Q. Explain to the ladies and gentlemen of the jury the conversation you just had with Mr. Wright as you understood it. Tell them what you are actually asking him.

A. I put my bid in to purchase the two ounces of hard.

Q. What if anything did you understand Mr. Wright to ask you back?

A. Yes.

Q. From the transcript, what did he respond to you?

A. I'm trying to get them two hard.

Q. And Mr. Wright's response is what?

[29] A. Trying to get two hard for what?

Q. The next word?

A. Unintelligible.

Q. No, after that?

A. Ready?

Q. The term ready, what does that mean to you?

A. Ready is actual street terminology for crack cocaine.

THE COURT: Yes, Mr. Bourgeois?

MR. BOURGEOIS: Your Honor, may I approach? I don't want to do this to the jury, but it's a problem.

THE COURT: Sure.

(The following colloquy then took place at the bench.)

MR. BOURGEOIS: The next word is unintelligible. This man is reading from the transcript. He is not testifying from the video anymore. I think that's a

problem here. This gentleman needs to be able to look at the tape and listen to what he allegedly said and did in that car. This is supposed to be an aid to the jury (unintelligible). I object to the way this is proceeding.

MR. WALLNER: I will just proceed from there.

THE COURT: Sustained. I suggest that you, for example, where it says "two hard," you can ask this gentleman what does he mean when he is saying "two hard." You can ask him his understanding of what his response was—

[30] MR. WALLNER: That's what I was doing.

THE COURT: —and then go line by line.

MR. WALLNER: I hadn't planned on doing that. It's just that this is the—

THE COURT: Just keep it moving.

(The proceeding then resumed in open court.)

(Playing of the tape was then resumed.)

BY MR. WALLNER (continuing):

Q. Can you tell the ladies and gentlemen of the jury what you were explaining to Mr. Wright when you were having that conversation with him?

A. I was explaining to him that if he can get it for cheaper than $2,000, that he can keep the remainder.

Q. From your recollection of the conversation, where is that?

A. Right here where it says:

"CS: Na, the reason why I was trying to tell you, that I might not have the whole two yo, I want—I want you to make out with something too."

Q. So, what were you saying to him?

A. I want him to make out with a couple of dollars for doing the actual transaction for me.

Q. A little bit before that you said you were going to come back for a whole 8th. What does that mean?

A. That means I was presenting to him like I was going to [31] get two ounces of cocaine and flip it and triple my money to come back and get the whole 8th.

Q. When you say an 8th, what are you talking about?

A. It's 1/8 of a brick.

Q. When you say a brick, you are talking about how much?

A. A kilo.

Q. How many ounces is that?

A. Four and a half.

(Playing of the tape was then resumed.)

Q. When you were saying that to Mr. Wright, what exactly were you telling him?

A. Just wanted him to make out with some money in turn to him doing this deal for me.

Q. When you said you would charge 18, what did you mean?

A. In other words, if he can get it for $1,800, he can keep $200 remainder for doing it.

Q. Of the $2,000?

A. Yes, sir.

(Playing of the tape then resumed.)

Q. Mr. Saffell, what was going on right there if you know while that telephone conversation was going on?

A. Well, he was telling his man how much money he had.

Q. How do you know that?

A. Because $1,600, you know, he's telling him he had $1,600.

Q. You're talking about $1,600?

[32] A. Yes.

Q. Were you in the 1600 block of Madison at the time this conversation was made?

A. No.

Q. Then he indicated to you how long? What was the time period he indicated it would take?

A. Fifteen minutes.

Q. Fifteen minutes before what?

A. Until he can hit back and let us know where to meet.

Q. When you say hit back, what do you mean?

A. Call back.

Q. Who call back?

A. For Mr. Wright to call back.

Q. For what, sir?

A. To purchase the two ounces of crack cocaine.

(Playing of the tape then resumed.)

BY MR. WALLNER (continuing):

Q. In that conversation right there, what did you understand that conversation to be?

A. What I wanted him to make out with for something for doing it for me.

Q. And you asked him about the price; is that correct?

A. Yes.

Q. And you said a sweet price, correct?

A. Yes.

[33] Q. What did you mean by a sweet price?

A. A thimpy price.

Q. How did Mr. Wright respond to you?

A. He said he's going to try to get it cheap as he can.

(Playing of the tape then resumed.)

Q. In that portion of the conversation, sir, what are you talking about?

A. The scale.
Q. The scale?
A. Yes, sir.
Q. What do you mean by that?
A. Just to make sure everything weighing up to what I want to purchase.
Q. When you said is he going to look out for you for doing this, what were you talking about?
A. I just wanted to know if he was going to hit Mr. Wright off with some money for doing it, getting him the sale, you know, because I was going to look out for him on my end.
Q. When you use the term the whole 0, what are you talking about?
A. An ounce.
Q. A whole ounce?
A. Yes.

(Playing of the tape then resumed.)

Q. What did you understood Mr. Wright to be saying to you [34] when he is talking about Rick 1,000?
A. He owed his man a couple of hundred dollars and he figured if he went to him and paid that off that he would give him what he wants.
Q. What do you mean "what he wants"?

MR. BOURGEOIS: Objection.

THE COURT: Sustained.

MR. WALLNER: Nothing further.

(Playing of the tape then resumed.)

BY MR. WALLNER (continuing):

Q. What does that term mean, soft and nine apiece?
A. Soft is powder cocaine.

(Playing of the tape then resumed.)

Q. What are you saying to Mr. Wright at that point?

A. I was pretty much making a statement that he could get it for $400 apiece each ounce—

Q. $400 apiece, is that exceptionally cheap?

A. Yes, very cheap.

Q. I'm sorry. I interrupted what you were going to say. Then what?

A. I was just making it known to him that it don't matter, I just wanted the two ounces of hard.

Q. You indicated that you knew Mr. Wright for approximately two years. Did you ever know his name?

A. No, just his nickname.

[35] Q. Which is what?

A. Daddio.

(Playing of the tape then resumed.)

Q. During that period of the transcript, is Mr. Wright speaking to you, sir?

A. No, he was talking to somebody on the phone.

Q. Do you know the nature of that conversation he was having?

A. Yes.

Q. What was it?

A. He was trying to let him know that he wouldn't charge him too much. He wanted to see him to make a purchase.

Q. What part of that conversation indicates that to you?

A. Right here when he said:

"Hello, this Daddio. I was just trying to hit you man. I got something urgent . . . Cant really rap to you, you know what I mean . . . "

That part right there.

(Playing of the tape then resumed.)

Q. In this part of the transcript, again, a conversation with Mr. Wright, what are you talking about?

A. We were talking about what I wanted.

Q. What did you want?

A. The two ounces of crack cocaine.

Q. There is an indication about cooking something up. What [36] does that mean to you?

A. He wanted to go get soft, which is powder cocaine, and cook it up to be hard cocaine.

Q. What is the purpose of cooking it up?

A. That is the way you transform powder cocaine into crack cocaine.

Q. In your experience as a narcotics dealer, have you ever done this?

A. Yes, sir.

(Playing of the tape then resumed.)

BY MR. WALLNER (continuing):

Q. Is Mr. Wright speaking to you at that particular point in time?

A. I really need to review it again. I lost control of the traffic in the background in this one particular part. (Previous portion of tape then played.)

Q. Did you hear this time?

A. Yes.

Q. Who is he speaking to, do you know?

A. He was speaking to the guy he owed money to, one of his connects.

Q. When he indicated he wanted a thousand, what was he asking for, do you know?

MR. BOURGEOIS: Objection.

THE COURT: Sustained.

[37] (Playing of the tape then resumed.)

Q. What are you saying there to Mr. Wright?

A. We were talking about a vehicle, a truck with wings on it.

Q. Prior to that?

A. Prior to that? Had the county on lockdown.

Q. What does that mean?

A. It means I was telling him that I had a lot of customers in the county that wanted the crack cocaine.

Q. When you said come to the whole 8th and I want a whole brick, what are you talking about?

A. That means we're going to trip this so fast, we're going to come back and get a half, cheap progress and get more and more every time.

(Playing of the tape was then resumed.)

BY MR. WALLNER (continuing):

Q. Looking at the videotape, Mr. Saffell, can you indicate what's going on at this particular point in time?

(Playing of the tape then resumed.)

Q. What happened, sir?

A. At that point he was going to meet up with the one dude that was at the place.

Q. Which place was this?

A. The place, it was a store on Harford Road right behind the convenience store.

[38] (Playing of the tape then resumed.)

THE COURT: Would counsel approach the bench, please.

(The following colloquy then took place at the bench.)

THE COURT: How long is this portion?

MR. WALLNER: Right now it's three and a half minutes. I could fast forward. (Unintelligible.)

(The following took place in open court.)

THE COURT: Ladies and gentlemen, we are going to fast forward a portion of the tape now. There are three minutes of no activity really so we will fast forward now for three minutes.

(Playing of the tape then resumed.)

BY MR. WALLNER (continuing):

Q. Did you hear that portion of the conversation, sir?

A. Yes, sir.

Q. What was Mr. Wright saying at that particular point in time?

A. He made contact with the dude but he want didn't want to do nothing because there was too many police around there.

Q. You say he made contact with the dude. Who is he?

A. Mr. Wright made contact—

Q. Who was the dude?

A. —with his connect.

[39] Q. And when you say his connect, what do you mean?

A. The person that supplies the cocaine.

(Playing of the tape then resumed.)

THE COURT: You fast forwarded again, Mr. Wallner.

MR. WALLNER: I did, Your Honor, and if you let Mr. Bourgeois and I approach—

THE COURT: Certainly.

(The following colloquy then took place at the bench.)

MR. WALLNER: I wanted the portions—

MR. BOURGEOIS: I could read it, too.

MR. WALLNER: I could actually hear what were supposed to be the—and the reason why I could is because the volume is so loud.

THE COURT: (Unintelligible).

MR. WALLNER: Pick it back up (unintelligible).

THE COURT: (Unintelligible).

MR. WALLNER: Okay.

(The proceeding then resumed in open court.)

THE COURT: Counsel, you will note the page number of the transcript.

MR. WALLNER: As soon as I can.

MR. BOURGEOIS: Page 7, Your Honor.

MR. WALLNER: Page 7, Your Honor, one-third of the way down.

[40] (Playing of the tape then resumed.)

MR. WALLNER: Again, Your Honor, that is a redacted portion.

(Playing of the tape then resumed.)

MR. WALLNER: Two-thirds of the way down, Your Honor, where it says CS.

BY MR. WALLNER (continuing):

Q. What was that conversation about?
A. About the barber shop there he used to be associated with.
Q. And when you were talking about selling vials, what are you talking about?
A. He's selling vials, like vials. Empty vials.
Q. What is the purpose of the vials?
A. To bag up cocaine.
Q. How are they sold?

MR. BOURGEOIS: Objection.

Q. If you know.

THE COURT: Sustained.

(Playing of the tape then resumed.)

THE COURT: Counsel, approach the bench for a second.

(The following colloquy then took place at the bench.)

THE COURT: (Unintelligible).

[41] MR. BOURGEOIS: Five lines down.

THE COURT: (Unintelligible) page 8 unnecessary. (Unintelligible). (Unintelligible).

MR. BOURGEOIS: (Unintelligible) be met by application.

THE COURT: Let me get my transcript.

(Pause in the proceeding.)

THE COURT: Page 8 (unintelligible).

MR. BOURGEOIS: (Unintelligible) page 8 (unintelligible).

THE COURT: (Unintelligible).

MR. WALLNER: Sure. Fine.

MR. BOURGEOIS: (Unintelligible) make a lot of that.

THE COURT: (Unintelligible).

(The proceeding then resumed in open court.)

THE COURT: Ladies and gentlemen, we are going to fast forward down to the reference to the Escalade automobile toward the bottom of page 8.

(Playing of the tape then resumed.)

MR. WALLNER: Your Honor, I can now fast forward a little further if you would like.

THE COURT: All right. Just tell me where you fast forwarded to, Mr. Wallner.

MR. WALLNER: Your Honor, it will pick up right after that portion of the conversation, but it's about five [42] minutes.

THE COURT: You're on the top of page 9 now.

MR. WALLNER: I'm still at the bottom of page 8. Both occupants are out of the vehicle again.

THE COURT: All right.

(Playing of the tape then resumed.)

MR. WALLNER: May we approach once again?

THE COURT: Yes.

(The following colloquy then took place at the bench.)

MR. WALLNER: (Unintelligible).

THE COURT: Red.

MR. WALLNER: (Unintelligible).

MR. BOURGEOIS: I have no objection, Judge, if you could just—for about the next 15 minutes, he talks about cars, and nobody wants to waste your time.

MR. WALLNER: 115 is in the middle of the next page.

THE COURT: The middle of page 10?

MR. WALLNER: Yes, sir. It's going to be right in here.

THE COURT: All right.

(The following then took place in open court.)

THE COURT: Ladies and gentlemen, we are going to fast forward again because it's just a general discussion about cars. We are going to go up to the middle of page 10 on [43] the transcript.

(Playing of the tape then resumed.)

MR. WALLNER: Now we will fast forward to 119, 36, just beyond the point where I marked the middle of page 10.

It's just below the line where CS says, "Hey."

THE COURT: The middle of page 10. All right.

(Playing of the tape was then resumed.)

BY MR. WALLNER (continuing):

Q. Who is the person in the conversation, Mr. Saffell, you were talking about there?

A. When Mr. Wright was giving me directions to go see the connect that we set up to buy with.

Q. Did you see in the videotape any portion of Mr. Wright was not in the vehicle with you during that—

A. Yes.

Q. Do you know where he had gone?

A. Into the—it was a store behind the store we stopped at, the convenience store. He went over to talk to somebody.

Q. When he came back you guys had a conversation. What was the nature of that conversation?

A. About meeting up with him. He wanted us to meet up his way.

Q. Who is he?

A. The other defendant.

(Playing of the tape then resumed.)

[44] Q. Can you tell the ladies and gentlemen of the jury what just happened during that part of the videotape and the transcript?

A. Yes. We went up to the spot to meet—

Q. When you say we, who are you talking about?

A. Mr. Wright went to the spot to meet the guy that we were going to purchase the cocaine from.

Q. What happened?

A. He got into the vehicle and I introduced myself and he introduced himself to me as D.

(Playing of the tape then resumed.)

BY MR. WALLNER (continuing):

Q. Mr. Saffell, can you explain to the ladies and gentlemen of the jury your conversation with Mr. Wright at that particular point in time?

A. Yes. He said he didn't want to ride back with me because I had the crack on me and he didn't want to get pulled over with me having that, and I was assuring him it was all right if he wanted me to take him back to his mother's house.

(Playing of the tape was then resumed.)

Q. What was that conversation at that point right there about?

A. I was faking it out like I wanted to stop and get a bag of smoke.

Q. When you say smoke, what are you talking about?

[45] A. Marijuana.

Q. Did Mr. Wright respond to you?

A. He said, no, you don't need to go with made, with that kind of stuff on you, coke.

Q. Did he use a term to describe the drugs?

A. Excuse me?

Q. Did he use a term to describe the drugs?

A. Use a term?

Q. What term did he use to describe the drugs?

A. Ready, crack, you know. I thought you were asking me what term do we use.

Q. During the conversation you had with him when you indicated you wanted to purchase some drugs, purchase some marijuana, did he indicate to you—Strike that.

(Playing of the tape was then resumed.)

MR. WALLNER: Your Honor, I can now fast forward for a significant period.

THE COURT: Approach the bench, counsel.

(The following colloquy then took place at the bench.)

THE COURT: 132. (Unintelligible).

MR. WALLNER: Right. I assure you.

THE COURT: You all decide (unintelligible) first forward (unintelligible).

MR. WALLNER: Judge, I really only have about 15 [46] minutes to play the whole thing.

MR. BOURGEOIS: Decide much (unintelligible) Rule 611, all evidence rules (unintelligible) Fourth Circuit (unintelligible). (Unintelligible).

(The following took place in open court.)

THE COURT: We will recess for 10 minutes.

(The recess was then taken.)

THE COURT: If we are ready, we will get the jury.

(The jury then returned to the courtroom.)

THE COURT: Are you ready to proceed, Mr. Wallner?

MR. WALLNER: Yes, Your Honor, I am.

Your Honor, this is page 14. It is located about two-thirds of the way down. That's all the pointers I can make.

(Playing of the tape was then resumed.)

BY MR. WALLNER (continuing):

Q. Mr. Saffell, who was speaking to you when he told you to pull behind the burgundy car?

A. The other defendant.

Q. Do you know his name?

A. Mr. Couther.

Q. What happened after you pulled behind the burgundy car, do you know?

A. That's where he got out.

(Playing of the tape was then resumed.)

[47] Q. Do you see that on the videotape?

A. Yes, sir.

(Playing of the tape was then resumed.)

Q. Mr. Wright asked you why you are doing a lot of talking on the phone. What did you believe he was expressing to you?

MR. BOURGEOIS: Objection.

A. Being concerned—

MR. BOURGEOIS: I objected, Your Honor.

THE COURT: The question is what did this witness believe Mr. Wright was saying to him.

MR. WALLNER: Yes.

THE COURT: The objection is overruled.

THE WITNESS: Being concerned about too much conversating in case the authorities are listening in on the conversation.

BY MR. WALLNER (continued):

Q. You indicated yourself you had been intercepted on a wiretap conversation, in a wiretap investigation before; is that correct?

A. Yes, sir.

(Playing of the tape then resumed.)

Q. What are you discussing with Mr. Wright in that portion of the transcript, sir?

A. About the scale.

Q. What about it?

[48] A. That I needed it.

Q. For what purposes, sir?

A. To make sure I'm getting what I'm supposed to get.

Q. Anything else you discussed at that particular point in time about stashing stuff?

A. Yes.

Q. About what? What was that conversation about?

A. About stashing, being safe, not trying to be open too much about it.

Q. You say stashing stuff. What are you talking about?

A. Stashing illegal narcotics, illegal stuff.

Q. Where?

A. In boxer briefs.

MR. WALLNER: Your Honor, now I will fast forward to the top third of page 17.

(Playing of the tape was then resumed.)

MR. WALLNER: There's a redacted portion, Your Honor.

BY MR. WALLNER (continuing):

Q. Mr. Saffell, in that portion of the transcript, what are you discussing with Mr. Wright?

A. About the stem part?

Q. Yes.

A. He was talking about me talking on the phone—

Q. What is a stem?

[49] A. A stem is an object that people use to smoke the cocaine out of.

(Playing of the tape then resumed.)

MR. WALLNER: Sorry, that's the end of the redacted portion.

(Playing of the tape then resumed.)

BY MR. WALLNER (continuing):

Q. What are you discussing with Mr. Wright in that portion of the transcript?

A. About us having to park so far away and him having to walk a distance.

Q. Him, who?

A. Mr. Couther.

Q. In this conversation what did you believe Mr. Wright was saying about why Mr. Couther had to walk so far?

A. Because he didn't trust nobody knowing where the stash house is.

Q. Mr. Wright actually called something two onions. Did you ever use the term onion before, sir?

A. Yes, sir.

Q. What does onion mean to you in the context of that conversation?

A. An ounce.

MR. WALLNER: A little further, Your Honor.

(Playing of the tape then resumed.)

[50] Q. On the videotape, what happens next, sir, as we go through this? After this conversation with Mr. Wright, what happens next, do you know?

A. Oh, that's when Mr. Couther is coming back to the truck.

Q. Do you see that on the videotape do you know?

A. Yes.

(Playing of the tape was then resumed.)

Q. What happened right there, Mr. Saffell?

A. Oh, I was being directed to drive which way.

Q. You said, yeah, that's straight. What did you mean?

A. When Mr. Wright handed it to me I looked at it and said it was straight weight wise.

Q. Can you see yourself being handed something in the videotape?

A. Yes, sir.

(Playing of the tape was then resumed.)

Q. After you were provided the cocaine, what if anything else occurred?

A. Excuse me?

Q. Did anything else occur with Mr. Wright and Mr. Couther after you were provided the cocaine? What did you do next?

A. Oh, we pulled off.

Q. Then what happened?

A. Then Mr. Wright handed me the cocaine and I looked at it and said it was straight.

[51] Q. After you got it, what did you do?

A. Put it in my boxer briefs right away.

Q. What happened after that?

A. Then I was directed to where he wanted to go.

Q. What happened after that?

A. I mean, they had to go somewhere.

Q. Did you drop them off?

A. Yes.

MR. WALLNER: To the bottom of page 22, Your Honor.

(Playing of the tape then resumed.)

BY MR. WALLNER (continuing):

Q. After these individuals exited the car, what did you do?

A. Pulled off.

Q. Where did you go?

A. Headed towards where Detective Tom Smith told me to meet him at.

Q. After you met Detective Tom Smith, what if anything did you do?

A. First I got out of the vehicle then I handed over the narcotics where we just copped from Mr. Wright and Mr. Couther.

Q. When you say copped, what do you mean?

A. I mean we just bought, the two ounces we just bought, I handed it to him once I was out, and I was patted down.

MR. WALLNER: Nothing further, Your Honor.

[52] THE COURT: Thank you, Mr. Wallner. Mr. Bourgeois?

MR. BOURGEOIS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BOURGEOIS:

Q. Mr. Saffell, where on that videotape—have you seen this whole videotape before?

A. No.

Q. When was the first time you saw it, today?

A. Yes.

Q. You didn't see in what Mr. Wallner showed you in any part of the videotape where you were handing

any money to anybody, did you? Did you see that on the videotape?

A. No. I know you can't really make out because half the time my arm was in the way.

Q. So, the answer to my question is "No" you didn't see that on the videotape?

A. No.

Q. Who did you hand the money to?

A. I handed the money to Mr. Wright.

Q. You handed the money to Mr. Wright. Are you sure about that?

A. Yes.

Q. Did Mr. Wright count it in front of you?

A. He claimed he did in front of me.

Q. I'm sorry.

[53] A. He claimed—he believed me it was already $2,000.

Q. You only knew Mr. Wright as Daddio; is that correct?

A. Yes, sir.

Q. And you handed him $2,000, and the man known to you only as Daddio took it and trusted you?

A. Yes.

Q. Had you ever met Mr. Couther before?

A. One time previous.

Q. Did you know his name that one time previous?

A. No, I hadn't.

Q. Had you bought drugs from Mr. Couther on that one previous occasion?

A. Yes.

Q. That was crack cocaine you bought from Mr. Couther on that previous occasion?

A. Yes, sir.

Q. You were approximately in the car with Mr. Wright for about an hour and a half or an hour and 45 minutes, does that sound right?

A. It seemed like a lot longer than that, though.

Q. And you were searched prior to your getting into the car, correct?

A. Yes, sir.

Q. And officers patted you down to make sure you had no money on you; is that right?

[54] A. Yes, sir.

Q. And they patted you down to make sure you had no drugs on you; is that correct?

A. Yes, sir.

Q. They provided you with $2,000; is that right?

A. Yes.

Q. Did you have any other money besides that $2,000?

A. No, I didn't.

Q. And the government agents told you, of course, that the reason they needed to search the car before you got into it was to make sure that there were no drugs already in the car, correct?

A. Yes, sir.

Q. And they also wanted to search the car they told you to make sure there was no money already in that car, correct?

A. Yes.

Q. Because they told you, that being the government agents, that they didn't want any question to arise as to how the drugs at the end of the transaction, where those drugs might have come from, correct?

A. Yes.

Q. And they wanted to make sure in case they recovered the money there would be no question as to where that money come from?

A. Yes, sir.

[55] Q. So, they wanted to make sure your person was clean and that the car was clean, correct?

A. Yes.

Q. And that's the whole reason, to make sure that no questions could arise, correct?

A. I assume so.

Q. Now, sir, you all stopped at (unintelligible) convenience store, correct?

A. Yes.

Q. And you asked Mr. Wright to buy you some cigarettes and a soda, correct?

A. Yes.

Q. And he told you, no, you get it yourself?

A. Yes.

Q. Mr. Wright then got out of the car, correct?

A. Yes.

Q. And you got out of the car, right?

A. Yes.

Q. And you were out of that car for about four to five minutes, correct?

A. Yes.

Q. During that four to five minutes, the video camera kept running, right?

A. Yes.

Q. But you were not on it, were you, because you were[56] outside the car?

A. Yes.

Q. During that four to five minutes whatever your actions were were not captured on that videotape, correct?

A. No.

Q. It's not correct?

A. No, I mean it's correct because we seen it.

Q. Now, you all got back in the car. By the way, you bought cigarettes and a soda, right?

A. Yes.

Q. Whose money did you use to buy those cigarettes and that soda?

A. I took $20 out of the $2,000 that was given to me through law enforcement.

Q. Okay. So, you used serialized money that was used for a drug transaction to buy yourself cigarettes, correct?

A. Yes.

Q. And you bought yourself a soda, correct?

A. Yes.

Q. Did you buy anything else for yourself with the government's money?

A. No, I didn't.

Q. You got back into the car, correct?

A. Yes.

Q. Then you all drove another distance, and at some point [57] you came to Prima Foods off Erdmann Avenue, right?

A. Yes.

Q. And you understood that the person traveling with you wanted to go there on a job interview, right?

A. Yes.

Q. In fact, he went inside the Prima Foods to go on a job interview, correct?

A. Yes.

Q. And you got out of the car, also, correct?

A. Yes.

Q. Once again, you were out of the car for six to eight minutes this time, correct?

A. Yes.

Q. And for that whole six to eight minutes the video kept running but you were not in the car, were you?

A. No.

Q. So, once again your activities are unexplained for a period time, correct? They are not on the videotape?

A. For a small period, yes.

Q. That's two periods now, correct?

A. Yes.

Q. Were there any other occasions during this period of time when you left the car and the video surveillance?

A. Just two.

Q. Okay. Now, we are going to change subjects a little bit, [58] okay? Do you remember Mr. Wallner asked you at the very beginning of your testimony today about a plea agreement that you entered into with the Baltimore City State's Attorney's Office, correct?

A. Yes, sir.

Q. That agreement was made on June 10, 2003?

A. Yes.

Q. That was a plea agreement that came about because of your arrest and involvement in a drug conspiracy, correct?

A. Yes, sir.

Q. That was a drug conspiracy involving the sale of cocaine, correct?

A. Yes.

Q. And there was a wiretap in that case and that's what got you tangled up in an arrest, correct?

A. Yes.

Q. And it was not just you in that drug conspiracy, was it?

A. Excuse me?

Q. It wasn't just you involved in that drug conspiracy, correct? There were 33 codefendants in that case; correct?

A. Yes, sir.

Q. And you cut a deal, right?

A. Yes.

Q. You cut a deal because you had had a fairly extensive criminal record before that and you knew that you were facing [59] a mandatory sentence in prison, correct?

A. Yes, sir.

Q. So, you figured you would do the best you could, correct?

A. Yes.

Q. So, you cut a deal that obligated you to cooperate with the State authorities, correct?

A. Yes.

Q. As a result of that deal, you avoided a 10-year mandatory sentence, correct?

A. Yes.

Q. In fact, you received two years home detention—the agreement was you would receive two years home detention followed by three years of probation, correct?

A. Yes.

Q. In fact, that two years of home detention you would be permitted to work at a job, right?

A. Yes.

Q. Outside of home, correct?

A. Yes.

Q. So, you wouldn't have to go to jail at all, right?

A. Yes.

Q. You recognize, sir, that you're a career criminal?

A. Yes, sir.

MR. WALLNER: Objection.

THE COURT: Overruled.

[60] BY MR. BOURGEOIS:

Q. I'm sorry. What was your answer?

A. I been in my fair share of trouble, though.

Q. You testified in this very court before another judge that you are a career criminal, haven't you?

A. Well, I had my fair share of troubles.

Q. My question is whether you testified in open court that you are a career criminal?

A. Well, yes, kind of. I messed up a lot in my life.

Q. Yes, sir, you messed up a lot in your life. For example, on April 2, 1991, you were arrested for daytime housebreaking; is that right?

A. That's correct.

Q. And you were given a three-year suspended sentence and two year's of probation for that?

A. I served time on that sentence.

Q. You served what?

A. I served time on that sentence.

Q. Because you violated the probation that you got in that case, right?

A. No, I received time for that charge.

Q. Okay. So, you received time for the 1991 daytime housebreaking, correct?

A. Yes, sir.

Q. And you also received probation following your time, [61] correct?

A. Yes, sir.

Q. And you violated that probation, correct?

A. Yes.

Q. You violated your probation because you were arrested on October 16, 1992, for a handgun crime and an assault; is that correct?

A. Yes.

Q. For the handgun offense you received three years, suspended all but six months, and two years probation, correct?

A. Yes.

Q. And on the assault, you received two years, right?

A. Yes.

Q. On the violation of probation for the housebreaking you received two years, right?

A. No, I received one year.

Q. You received one year. I'm sorry. But you were released from prison on that in February of '93, correct?

A. I was over Baltimore City Detention Center.

Q. Baltimore City Detention Center?

A. Yes.

Q. And you were released from the Baltimore City Detention Center in February of 1993, correct?

A. Yes, sir.

[62] Q. Shortly thereafter you were arrested once again for possession with intent to distribute cocaine, right?

A. Yes, sir.

Q. You were sentenced in 1994 to seven years in prison for possession with intent to distribute cocaine?

A. Yes.

Q. And you were released from prison on June 26, 2000, right?

A. Yes, sir.

Q. Then your very next crime was the one we talked about a few minutes ago, the conspiracy with 33 codefendants to distribute cocaine, right?

A. Yes, sir.

Q. That's where you cut your deal, right?

A. Yes.

Q. Now, when you cut that deal June 10, 2003, you agreed to cooperate with the authorities to set people up, right?

A. Yes.

Q. And you in fact were released from the Baltimore City Detention Center after your arrest so that

you could actually help the authorities set people up, right?

A. Yes.

Q. You were put back out on the street?

A. Yes.

Q. You promised as part of that agreement with the [63] government that you would not engage in any further illegal activity, correct?

A. Yes.

Q. You promised that you would not break any laws, right?

A. Yes.

Q. You broke those promises, correct?

A. Yes, sir.

Q. Because while you were awaiting sentencing in the Baltimore City cocaine distribution case and while you were cooperating with the authorities you got arrested in January of 2004, didn't you?

A. Yes, sir.

Q. You got arrested in January of 2004 because there was cocaine located in your house by police officers, correct?

A. Yes, sir.

Q. 14 1/2 grams of cocaine, correct?

A. Yes, sir.

Q. And you were charged with that crime with possession with intent to distribute that cocaine, correct?

A. Yes.

Q. That was in Baltimore County, right?

A. Yes.

Q. You had a lawyer in that case?

A. No.

Q. Did you not have a lawyer before it went to trial?

[64] A. Actually it got postponed one time because I didn't have a lawyer.

Q. Did you ever get a lawyer in that case?

A. I finally did get one, yes.

Q. Now, you understood when you were arrested in January of 2004 that is a real problem for you, correct?

A. Yes.

Q. Because that was proof that you were breaking your promise to the government in the plea agreement, correct?

A. Yes.

Q. You knew that the government, at least the Baltimore City State's Attorney's Office, was no longer required to abide with its agreement with you as a result of your arrest, correct?

A. Yes.

Q. So you figure you were going to do anything and everything you could to help yourself out of the fix that you found yourself in in January of 2004, correct?

A. Well, I do what I had to do to cooperate to try to make my situation better.

Q. And one of the things that you figured you would cooperate to make your situation better was bring the attention of the authorities that not only were you possessing cocaine in January of 2004, but that you had been for the prior six months or so involved in a drug ring involved with [65] the manufacturing and planned distribution of Ecstasy, correct?

A. Yes.

Q. You brought that to their attention after your arrest in January of 2004, correct?

A. Yes.

Q. Now, in fact, when did your involvement begin with this MDMA, Ecstasy, manufacturing ring?

A. Say that again.

Q. When did you start with that?

MR. WALLNER: Objection, Your Honor. May we approach?

THE COURT: Yes.

(The following colloquy then took place at the bench.)

MR. WALLNER: Your Honor, I honestly don't have any problem with Mr. Bourgeois impeaching the credibility of this witness, but I don't think it's appropriate that we go through factually every single thing he has done. The impeachment by prior conviction is fine, and I think that's appropriate, but to deal with the factual allegations of each individual case is going to be a bit burdensome here.

MR. BOURGEOIS: That was the next question.

THE COURT: (Unintelligible), but that is about his case, so the objection is overruled.

[66] MR. BOURGEOIS: Thank you.

(The proceeding then resumed in open court.)

BY MR. BOURGEOIS (continuing):

Q. I'm sorry, Mr. Saffell. And if I called you Saffell, I apologize. I didn't know before today your name was pronounced Saffell.

A. Okay.

Q. When did you first become involved with this MDMA, Ecstasy, manufacturing ring?

A. It's been awhile. It's hard to (unintelligible).

Q. Okay. Well, would you agree with me that your involvement in that ring started just about the time you were arrested in Baltimore City and started cooperating with the authorities?

A. No. (Unintelligible).

Q. Was it before, or after that?

A. If I was approximate, I would tell you.

Q. Be approximate.

A. I don't want to say something that's not true, so I can't recollect.

Q. Well, let me put it this way: When you signed your plea agreement on June 10, 2003, had you already started your involvement with the MDMA lab?

A. No, I never even knew the defendants at that time.

Q. Okay. When did you first begin? Sometime after that [67] plea agreement, correct?

A. Yes.

Q. Was it six months after, a year after?

A. I would say it would be approximate. It's been awhile.

Q. Did you tell Sergeant Smith, who you were working with, that you had become involved with an MDMA lab?

A. Yes, I had.

Q. Did you tell him at the time you were involved in it or did you tell him the first time after you got busted in January?

A. No, it came right afterwards.

Q. Okay. So, while it was up and running, but before you got arrested on another crime, you didn't tell Sergeant Smith that you were involved in setting up an Ecstasy lab to manufacture illegal drugs, correct?

A. Yes.

Q. You didn't tell them that you intended to sell the Ecstasy to young people; is that right?

A. Yes.

Q. You intended to sell each of the pills for $10 to $15; is that right?

A. Yes.

Q. And there were to be hundreds of thousands of pills manufactured in this lab?

A. Yes.

[68] Q. In fact, while you were supposedly acting as a government cooperator, you actually delivered the flasks, glassware, and other laboratory equipment to manufacture this MDMA lab?

A. No. I went there to pick it up with somebody.

Q. You picked up all of this equipment to deliver it to where this lab was going to be run, right?

A. Yes.

Q. So, you actually built the lab, right?

A. Yes.

Q. In that lab, a number of chemicals are cooked together and packed into gel caps for sale on the street; is that right?

A. Yes, sir.

Q. You built that lab desk, platforms, and the cooking station?

A. Yes.

Q. You oversaw the actual making of the Ecstasy?

A. Actually it all depends what you're talking about.

Q. Do you recall testifying in this court, the United States District Court for the District of Maryland, in an MDMA drug trial?

A. Yes, I do.

Q. Do you recall testifying in that case that you oversaw the making of the Ecstasy?

A. Oh, sure. I didn't know what you meant, the specifics.

[69] Q. Now, you were not arrested for your involvement in this lab, were you?

A. No.

Q. You have not been obviously sentenced because you were not arrested, correct?

A. Yes.

Q. You've gotten a free pass on that because of your cooperation?

MR. WALLNER: Objection.

THE COURT: Overruled.

Q. Sir, you've gotten a free pass on that?

A. I don't know about a free pass, but my cooperation bought me that much.

Q. Your cooperation bought you a free pass?

A. I don't know about a free pass.

Q. What did it buy you? You said your cooperation bought you something.

A. No, actually in hopes that it will help me in my case in the future for this case I am going to court for in October.

Q. Okay. And that's from the arrest back in 2003, correct?

A. Yes, sir.

Q. You are not going to court anytime soon on this MDMA lab, right?

A. No.

Q. In fact, your criminal case in Baltimore County was [70] stetted or dismissed by the State, correct?

A. Yes, sir.

Q. That was after your lawyer brought to the attention of Baltimore County authorities the fact that you had been cooperating with the federal authorities, correct?

A. I'm not sure. I just know it was stetted.

Q. You're still on the street today a free man?

A. Yes, sir, a free working man.

Q. Okay. You've been working for the last five months; is that right?

A. Actually longer than that.

Q. Six months?

A. It might be even a little longer than that.

Q. Prior to that, as you testified earlier, you were a professional drug dealer pretty much all your life since the age of 13, right?

A. Yes.

Q. And that's when you began your life of crime, at age 13?

A. Yes.

Q. Did you know who put the camera or the recording equipment in the car that you used to help set up Mr. Wright?

A. At first I never knew about a camera being in the vehicle.

Q. You didn't know about it at all?

A. No.

[71] Q. Were you provided a scale by the federal authorities?

A. Yes, sir.

Q. The purpose that they provided you that scale was so that you could go through the motions of actually going through a drug deal by weighing it, correct?

A. Yes.

Q. In fact, you say that Mr. Couther brought drugs into that car and it was handed to you. You put it in your pocket and you never weighed it, did you?

A. No. He directed me to pull out.

Q. He directed you to pull up?

A. No, to pull where I was going to drop them off at, Mr. Wright and Mr. Couther.

Q. So, you were just going to take it on blind faith that a person that you had met only once before and knew only as D had given you $2,000 worth of crack cocaine, correct?

A. Well, I didn't want to make him uncomfortable by taking the time to stop. I already seen he was

uneased about being in the vehicle after making the transaction and having it on me.

Q. So, you were concerned about his state of mind and you were not concerned about actually weighing the drugs that you had allegedly just handed $2,000 over for?

A. Yes, sir.

Q. Now, at some point in this transcript, this tape that [72] Mr. Wallner reviewed with you, sir, you testified that Mr. Wright was expressing a certain amount of discomfort about riding in that car with you; is that right?

A. Yes, sir.

Q. I think, as you explained it to us, that Mr. Wright was uncomfortable because you were talking freely on the telephone and also carrying drugs on you, correct?

A. Yes, sir.

Q. Now, do you recall in the sequence of events that that conversation occurred before Mr. Couther ever got into the car?

A. What is that you were talking about and specific?

Q. Can I be specific? Well, I am asking you about your testimony. We are talking about a sequence of events, what happened first. Now, you testified, you told us that Mr. Wright, you translated for us I guess the street talk, and he was expressing concern, and in fact he was going to catch a hack or perhaps catch a cab because he didn't want to be in the car with you because you had drugs, right? Is that what you translated that conversation to mean?

A. No.

Q. Oh, it's not?

A. No.

Q. What do you mean by that translation?

A. He was talking about if he has to catch a hack to the guy [73] it showing how he wants it. He wanted to make that deal happen with his connect.

Q. Well, I think the jury's recollection will be better on this.

MR. WALLNER: Objection.

THE COURT: Sustained.

MR. BOURGEOIS: I withdraw the comment.

THE COURT: Don't comment on the testimony.

MR. BOURGEOIS: Yes, sir.

BY MR. BOURGEOIS (continuing):

Q. Did you not say during the course of that videotaped conversation that your whole life revolves around drugs?

A. It's pretty—I mean, it helps me if you could pinpoint it to me.

Q. Do you recall sitting here today that you made—

A. There may be a lot of stuff that I can't remember. It's been so long ago.

Q. You don't remember because I think as you said on this videotape you smoked so much pot, correct?

A. Yes, I did say that.

Q. Isn't it a fact, sir, that your memory has been affected by the amount of drugs you have ingested?

A. No. No.

Q. Are you on drugs right now?

A. No, I'm not.

[74] Q. When is the last time you ingested a controlled substance, an illegal drug?

A. It's been months.

Q. Months?

A. Yes.

Q. How many months?

A. It had to be at least over six months because my job does random urinalysis.

Q. So, prior to obtaining your job six months ago, when was the last time you did drugs, sir?

A. I can't recollect on that.

Q. Did you do drugs while you were participating in this set up deal?

A. No, I didn't.

Q. Did you do drugs when you were participating and taking down or testifying against the people in MDMA, Ecstasy, lab?

A. No.

MR. BOURGEOIS: Bear with me one second.

(Pause in the proceeding.)

BY MR. BOURGEOIS (continuing):

Q. I want to be absolutely crystal clear about something you testified to today. Who did you hand the money to in that car on September 14, 2004?

A. I handed James Wright the money in the car.

Q. You handed the money to James Wright?

[75] A. Yes.

MR. BOURGEOIS: I have no further questions, Your Honor.

THE COURT: Okay. Thank you, Mr. Bourgeois. Mr. Wallner, any redirect, sir.

MR. WALLNER: Just briefly.

REDIRECT EXAMINATION

BY MR. WALLNER:

Q. Mr. Saffell, Mr. Bourgeois asked you several times about whether or not you exited the vehicle at

different times during this hour and 45 minutes or so that you were driving around.

Do you recall those questions.

A. Yes, sir.

Q. Do you recall him asking you those questions?

A. Yes.

Q. Were you aware, sir, during this entire transaction whether or not you were under surveillance?

A. All I was aware about was I pretty much knew that they would be following, you know what I mean.

Q. When you say they, who are you talking about?

A. The law enforcement.

Q. Were you provided a body wire by anybody at that particular point in time?

A. Yes, sir.

[76] Q. Who provided you with a body wire?

A. Detective Smith.

Q. Were you aware that the body wire would be monitored by Detective Smith during this transaction?

A. Yes, sir.

Q. You were asked, sir, whether or not you had met Mr. Couther before; is that correct?

A. Yes.

Q. You stated you had met him one time in the past, correct?

A. Yes.

Q. You stated you had been provided cocaine by him one time in the past, correct?

A. Yes, sir.

Q. Who set up that meeting between you and Mr. Couther?

A. Mr. Wright.

Q. Finally, sir, on October—is it the 17th is your sentencing?

A. Yes, sir.

Q. On October 17, 2005, you are facing a term in prison; is that correct?

A. Yes, sir.

Q. And that's for your transgressions throughout this time period; is that correct?

A. Yes, sir.

Q. What do you know the recommendation from the State's [77] Attorney's Office for Baltimore City could be at the time of your sentencing on October 17, 2005?

A. Ten years.

Q. Despite your testimony here today and all co-operation, correct?

A. Yes, sir.

MR. WALLNER: Nothing further, Your Honor.

THE COURT: Thank you, Mr. Saffell. You may step down, sir. There is a sequestration order in effect, so you should not discuss your testimony with anyone, sir, in the event you are called back to the witness stand; do you understand that.

THE WITNESS: I understand.

(Witness excused.)

MR. WALLNER: May we approach, Your Honor?

THE COURT: Certainly.

(The following colloquy then took place at the bench.)

MR. WALLNER: This will be short. I can put Detective Crawley on the stand or we can (unintelligible).

THE COURT: (Unintelligible).

MR. WALLNER: Very well, Your Honor.

(The proceeding then resumed in open court.)

THE COURT: Ladies and gentlemen, we are going to go no later than 5 o'clock today, maybe 4:50, and then we can [78] come back tomorrow morning. The schedule is that I believe Detective Crawley will testify next, and then we will hear testimony in the morning tomorrow. We will not be sitting after lunch tomorrow, and then you will be here Thursday morning.

Now, again, the one particular juror I know of that had an employment concern should definitely talk to Ms. Moye and make sure I have the name of the employer, and I will certainly send a note to that employer indicating that the case is going over a little bit more. Make sure someone speaks with Ms. Moye. Ms. Moye, if you will follow up on that.

THE CLERK: Sure.

THE COURT: Thank you. Mr. Wallner?

MR. WALLNER: Your Honor, can we approach?

THE COURT: Sure.

MR. WALLNER: I apologize.

THE COURT: That's all right.

(The following colloquy then took place at the bench.)

MR. WALLNER: (Unintelligible). The only thing is that Mr. Saffell is out there potentially by himself. (Unintelligible).

THE COURT: I understand.

MR. WALLNER: Could we have five minutes? I just [79] didn't want (unintelligible).

THE COURT: (Unintelligible).

MR. WALLNER: (Unintelligible).

THE COURT: (Unintelligible).

MR. WALLNER: Very well.

(The proceeding then resumed in open court.)

(Pause in the proceeding.)

MR. WALLNER: Your Honor, the government calls Detective Dwayne Crawley.

DETECTIVE DWAYNE CRAWLEY

WAS DULY SWORN TO TELL THE TRUTH

THE COURT: Ladies and gentlemen, just so you understand, by the way, in terms of a sequestration order where witnesses cannot be in the courtroom to hear other witnesses, the one exception to that rule is in the case of a case agent for the government. Detective Crawley is a designated case agent in the case and that's why he has been permitted to be seated at the trial table and hear what other witnesses have said in case some of you are wondering about the matter of sequestration. You don't see that on television when you watch TV in respect to trials in terms of matters of sequestration of witnesses, which is a routine procedure. But the one exception to that is the case agent is allowed to sit at trial table.

You may continue, Mr. Wallner.

[80] MR. WALLNER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. WALLNER:

Q. Detective Crawley, can you tell the ladies and gentlemen of the jury your current assignment, please?

A. I am a task force officer with the Drug Enforcement Administration assigned to HIDA Group 51, violent drug traffickers, et cetera.

Q. What agency do you work for principally, sir?

A. The Baltimore City Police Department.

Q. How long have you been a member of the Baltimore City Police Department?

A. About six years.

Q. During that time period, sir, can you tell the ladies and gentlemen of the jury what if any training or experience you had in the area of narcotics?

A. I received approximately 300 hours of training from various agencies, Northeast County Drug Administration, the Drug Enforcement Administration, Multi-jurisdictional County Drug Task Force, and related from undercover purchases, investigating narcotic cases, conspiracy, intercepts, secure communications, interview and interrogation, identifying deceptive behavior through forensic statement analysis, and additional courses as well.

Q. Can you explain to the ladies and gentlemen of the jury [81] some of the positions you have held with the Baltimore City Police Department up to and including the present position?

A. I was a patrol officer in the Southeastern District for approximately two and a half years, three years. After that I was brought down to the Criminal Investigation Division in the Narcotics Section, and I was assigned there through June of 2004, which I was assigned to the HIDA Task Force Group 51, which is my current assignment.

Q. Sir, have you had occasion to make arrests with regard to the violation of narcotics laws?

A. Yes.

Q. Can you explain to the ladies and gentlemen of the jury approximately how many arrests you have made?

A. In excess of 300.

Q. During that time period of arrests, have you had the opportunity to debrief or interview these

individuals about current trends in narcotics trafficking?

A. Yes.

Q. Have you had the opportunity to use confidential sources or confidential witnesses?

A. Yes.

Q. Have you become familiar with the use of electronic equipment and as it relates to wiretapping, for example?

A. Yes.

Q. Have you participated in any wiretap investigations where [82] you have had the opportunity to hear conversations amongst narcotic traffickers?

A. Yes, I participated as a monitor on a surveillance team and I was an affiant on a wiretap.

Q. When did that occur, sir?

A. I was an affiant in 2002 and monitor on a surveillance team from 2002 on.

Q. Have you become familiar with the terminology and certain terminologies used by narcotic traffickers to conceal the terms of art in drug trafficking?

A. Yes.

Q. Have you had the ability to use these in particular conversations?

A. Yes.

Q. Have you had the opportunity to debrief arrestees with regard to continued narcotics operations?

A. Yes.

Q. Have you ever been qualified as an expert in any state, or any jurisdiction, or any court with regard to your expertise in the area of narcotics?

A. In District Court and Circuit Court for Baltimore City.

MR. WALLNER: Your Honor, at this time I would ask that Detective Crawley be recognized as an expert in narcotics, please.

THE COURT: An expert in narcotics or an expert in [83] drug distribution methods and organization.

MR. WALLNER: That's fine, Your Honor.

THE COURT: You are proffering this witness as an expert in drug distribution methods and organization. Do you want to voir dire on this, Mr. Bourgeois.

MR. BOURGEOIS: No, Your Honor.

THE COURT: Again, ladies and gentlemen, there is a limit on the matter of opinion testimony pursuant to Rule 702 of the Federal Rules of Evidence. One can be qualified as an expert in a particular area. Detective Crawley has been qualified as an expert with respect to drug distribution methods and organization.

You may continue, Mr. Wallner.

MR. WALLNER: Thank you, Your Honor.

BY MR. WALLNER (continuing):

Q. Detective Crawley, can you tell the ladies and gentlemen of the jury some of the terms you have heard for crack cocaine?

A. Ready, hard. That's general terms.

Q. What about in terms of quantities, and explain the term and what the quantity is?

A. Okay. Like 0 for ounces, onions for ounces, Big 8 meaning 1/8 of a kilogram of cocaine, Little 8 could be an 8 Ball, which is 1/8 of an ounce, a 1/2 key, 1/4 key, meaning 1/4 of a kilogram of cocaine, 1/2 kilogram of cocaine, things [84] of that nature.

Q. What about the term brick?

A. Yes, bricks for one kilogram of cocaine.

Q. Or the term bird?

A. Bird, yes.

Q. With regard to quantities of narcotics, can you explain to the ladies and gentlemen of the jury how

drugs break down, how many grams are in an ounce, how many ounces in a bird?

A. Okay. There is 1,000 grams in a kilogram of cocaine, one ounce is 28 grams, one gram is about the size of a Sweet and Low bag, if you're familiar with that. A quarter of an ounce is seven grams. Half of an ounce is 14 grams. An eighth of a key is 4 1/2 ounces.

Q. Explain to the ladies and gentlemen of the jury the process by which drugs are converted into crack cocaine. You heard Mr. Saffell testify about cooking, correct?

A. Yes.

Q. Have you heard that term?

A. Yes.

Q. What does that mean?

A. This is just when they process the powder cocaine, cocaine hydrochloride to the crack cocaine or the cocaine base.

Q. Do you know how that is done?

A. Yes. They would cook it using baking soda. There was [85] some people who would cut it with, when you cut it, meaning process it, they would use creative, and they could process it on the stove or in the microwave.

Q. So, during the course of playing the videotape, you heard the term two onions being used; is that correct?

A. Yes.

Q. Explain to the ladies and gentlemen of the jury what two onions means?

A. It would refer to two ounces of cocaine.

Q. How many grams of cocaine would that be?

A. Fifty-six.

Q. Sir, you were the case agent involved in this particular case; is that correct?

A. Yes, sir.

Q. Can you explain to the ladies and gentlemen of the jury your responsibilities with regards to this case?

A. We established that Mr. Wright was a cocaine dealer in Baltimore's metropolitan area and we initiated an investigation and attempt to purchase cocaine from him.

Q. Is that where you employed the services of Mr. Saffell?

A. Yes.

Q. Then as it relates to the investigation on September 14, 2004, what if anything did you personally do with regard to the investigation?

A. We began, Sergeant Smith recorded a controlled call to [86] Mr.—

MR. BOURGEOIS: Your Honor, may we approach?

THE COURT: Yes.

(The following colloquy then took place at the bench.)

MR. BOURGEOIS: I am a little concerned that Detective Crawley just stated we established Mr. Wright was a cocaine dealer in the Baltimore area, which I think was not what was asked as such, but it just got slipped in in front of this jury.

THE COURT: (Unintelligible).

MR. BOURGEOIS: (Unintelligible).

THE COURT: Testifying witness (unintelligible) them explain Mr. Wright and (unintelligible) route address (unintelligible).

MR. WALLNER: Right.

THE COURT: (Unintelligible).

MR. BOURGEOIS: I would like that testimony stricken and a cautionary—

THE COURT: (Unintelligible).

MR. BOURGEOIS: (Unintelligible).

THE COURT: (Unintelligible).

MR. BOURGEOIS: Neither his testimony.

THE COURT: Well, he has not stated then (unintelligible) damage. (Unintelligible).

[87] MR. BOURGEOIS: I particularly part of my (unintelligible) mistrial, particularly (unintelligible) up on cross-examination discuss (unintelligible).

(The proceeding then resumed in open court.)

THE COURT: Ladies and gentlemen, just one matter.

The reference by Detective Crawley to "we established" will be stricken and should be disregarded by you. It's just in terms of this police officer's view in terms of the conduct of his investigation that that was the suspicion he formed. The matter of "we established," those two words should be stricken from the record and disregarded by you.

All right, Mr. Bourgeois?

MR. BOURGEOIS: Thank you, Your Honor.

THE COURT: Go ahead, Mr. Wallner.

BY MR. WALLNER (continuing):

Q. Detective Crawley, I may have jumped ahead of myself.

You discussed the term cooking of crack cocaine, correct?

A. Yes.

Q. How cocaine hydrochloride is converted to crack cocaine, correct?

A. Yes.

Q. Once crack cocaine or cocaine base is cooked up, what happens to the crack cocaine? What is done for it to be distributed?

[88] A. It's broken down into different increments. It could be $50 rocks. It would be $20, $10 vials or $10 bags and distributed on the street.

Q. How are these sold?

A. They are sold on the street in individual increments.

Q. How does an individual such as Mr. Saffell, who was attempting to purchase or has purchased in the past, 50 grams of crack cocaine, how does he then get that into the bag form and how much money can he make during that process?

A. What he would do is you would have to break it down. He can put it into the bag or a vial by using different methods, and once he sells it on the street he is able to double or even sometimes triple his money depending on how much he paid for it.

Q. So, a 50-gram quantity is not for street-level distribution; is that correct?

A. I would say so.

Q. What is sold on the street to the individual user?

A. Oh, yeah, I'm sorry. No, it is typically not sold at a street level. It would be broken down into smaller increments, which eventually is sold at street level.

Q. Now, what is the going price, give or take, for an ounce of crack cocaine?

A. $800 to $1,000, depending upon the purity level.

Q. Depending upon the purity level, and you heard testimony [89] from Mr. (unintelligible) saying the purity level is about 41 percent, do you recall that?

A. Yes.

Q. Once the drugs are purchased in the ounce form, how much does the individual increments that are sold on the street go for?

A. $10, $20.

Q. How much out of one ounce of crack cocaine do you get in individual quantities to be sold on the street in order to be able to make a profit? Do you understand that question? That was a terrible question.

MR. BOURGEOIS: Objection.

THE COURT: Actually Mr.. Wallner just said it is a terrible question, and I think he was about to withdraw it and ask another question.

MR. WALLNER: Yes, Your Honor. I'm sorry.

THE COURT: You may do that and Mr. Bourgeois can wait for the next question. It's getting late in the day. Go ahead, Mr. Wallner, you can try to rephrase that question.

MR. WALLNER: I'm working on it.

BY MR. WALLNER (continuing):

Q. From an ounce of cocaine, crack cocaine, how does an individual dealer make his money by converting it? Where does the profit come from?

A. The profit comes from breaking it all the way down to the [90] street-level sales. The nickel, the $5, $10, $20 increments, that's the way you make the most profit.

Q. How much individual increments at $10 a bag can you get from an ounce of crack cocaine?

A. I would say between 60, 70 maybe.

Q. So, now let's go to your investigation. You began your investigation. On September 14, 2004,

what if anything did you personally do or observe while the operation was ongoing?

A. I observed Sergeant Smith with the CS make a control call to Mr. Wright. They set up a meeting and we sent the surveillance team out there beforehand to get in place for when the CS would arrive. Sergeant Smith then searched Mr. Saffell checking for contraband, money, things of that nature. While he was doing that, I was checking the vehicle and preparing the vehicle to be ready for Mr. Saffell.

Q. You said you were preparing the vehicle to be ready.

What if anything were you doing?

A. I place the 8 mm tape into the video recorder, just searched it, make sure there was nothing left in there previously from another group that possibly used it, things of that nature.

Q. Did you conduct that search?

A. Yes.

Q. Did you find anything?

A. No.

[91] Q. The videotape we reviewed here in this courtroom, that's in VHS format, correct?

A. Yes.

Q. Can you explain to the ladies and gentlemen of the jury who removed the videotape at the end of the operation?

A. I removed the videotape at the end of the operation.

Q. You placed the videotape in and you removed it; is that correct?

A. Yes.

Q. Can you explain to the ladies and gentlemen of the jury, the videotape that we have as Government's Exhibit Number 2, how did the VHS tape come to be produced?

A. Afterwards, we took it back to the office. We had a machine set up where we could record from 8 mm to VHS, and while it was recording, just sat down and watched the recording while it was making the recorded copy.

Q. You have seen this video today, correct?

A. Yes.

Q. Is it the same video as the one you observed the day you removed it from the vehicle?

A. Yes.

Q. In additional to searching the vehicle on September 14, 2004, did you provide anything to anybody for the purposes of the operation?

A. Yes.

[92] Q. What did you do?

A. Right before we were getting ready to go, I provided Mr. Saffell with this digital scale.

Q. When the operation was over, aside from obtaining the videotape and making a copy as you indicated you have done, what if anything did you do with regard to the drugs themselves?

A. We submitted them.

Q. Were you responsible for the process of submitting these drugs?

A. Yes.

Q. Who did you obtain these drugs from?

A. From Sergeant Smith.

Q. I show you Government's Exhibit Number 5A. Do you recognize that?

A. Yes.

Q. What is it?

A. It's a DEA Form 7.

Q. Who filled out that form, sir?

A. I did.

Q. Is that your signature on that form?

A. Yes, sir.

Q. What does that form indicate?

A. It is just a form that we fill out to submit the drugs to the Midatlantic Laboratory.

[93] Q. I will show you Government's Exhibit Number 4. Do you recognize this?

A. Yes.

Q. What is that?

A. This as a packaging and the drugs that we seal to be processed.

MR. WALLNER: Your Honor, I have nothing further.

THE COURT: Thank you. Mr. Bourgeois?

MR. BOURGEOIS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BOURGEOIS:

Q. Detective Crawley, how are you?

A. All right, sir. How are you doing?

Q. Okay. You will admit, won't you, that you and other law enforcement personnel made numerous mistakes in this investigation?

MR. WALLNER: Objection.

THE COURT: Sustained as to his comment on others. He can certainly respond as to himself, Mr. Bourgeois.

BY MR. BOURGEOIS (continuing):

Q. You will admit, sir, that you made mistakes in this investigation?

A. Yes, sir.

Q. For example, on September 14, 2004, you submitted an Affidavit to Judge Edward Murphy, correct?

[94] A. Yes, sir.

Q. And in that affidavit, you swore that certain facts were true, correct?

A. Yes, sir.

Q. And you made that Affidavit to Judge Murphy under penalty of perjury, correct?

A. Yes, sir.

Q. And you signed that Affidavit in Judge Murphy's presence?

A. Yes, sir.

Q. And you told Judge Murphy under oath that the person that you were investigating who was in the car with Mr. Saffell was a guy named Eric Wright, correct?

A. Yes, sir.

Q. That was false, wasn't it?

A. Yes, sir.

Q. Yet you referred to Eric Wright 13 times in that sworn Affidavit?

A. Right. It was a mistake on my behalf from preparing the search warrant.

Q. Not once in your Affidavit did you mention James Wright; is that correct?

A. No, but I mentioned his address and date of birth.

Q. Sir, my question was real simple. Did you at any time, did you once mention James Wright in that Affidavit to Judge Murphy?

[95] A. No.

Q. Did you know that Officer (unintelligible) filed a Statement of Charges against Mr. Wright in the District Court of Maryland for Baltimore County arising out of this arrest?

A. Yes, sir. I helped him prepare it.

Q. Okay. When you helped him prepare it, did you help him insert the name Eric Wright as opposed to James Wright?

A. Yes, I did.

Q. You know that Officer (unintelligible) referred three times in that statement to Eric Wright, correct?

A. Yes, sir. That's because I helped him prepare the Statement of Probable Cause.

Q. So, we see how mistakes were promulgated through other documents, correct?

A. Yes, sir.

Q. So, that was one of the mistakes that you made that multiplied, correct?

A. Yes, sir.

Q. Did you know that Officer (unintelligible) went back to the Statement of Charges submitted to the Court and whited out the name Eric Wright and filled in the name James? Did you know that?

A. No.

MR. BOURGEOIS: May I approach the witness, Your Honor?

[95] THE COURT: Yes.

BY MR. BOURGEOIS (continuing):

Q. I hand you, sir, the defendant's original copy of the Statement of Charges. Do you see that, sir?

A. Yes, sir.

THE COURT: Is that going to be marked for identification, Mr. Bourgeois?

MR. BOURGEOIS: I think I might, Your Honor.

THE COURT: It's marked as Defendant's Exhibit 1 for identification.

MR. BOURGEOIS: Thank you.

BY MR. BOURGEOIS (continuing):

Q. I hand you Exhibit 1 for identification, sir, and do you recognize this as the Statement of Charges prepared by Officer (unintelligible)?

A. Yes.

Q. Is this the document you helped him prepare?

A. Yes.

Q. And you will note at the top left it says, Wright, Eric, and then it says James underneath Eric?

A. Yes.

Q. Under the defendant's name it says Wright, and then there is some whiteout and James written on top of that. Do you see that, sir?

A. Yes.

[97] Q. Thank you, sir.

MR. BOURGEOIS: I would move the exhibit, Your Honor.

THE COURT: So admitted.

BY MR. BOURGEOIS (continuing):

Q. Now, that is not the only mistake, the reference to Eric Wright, that you made in this case, correct?

A. What's that, sir? You mean to the search warrant and—

Q. Well, I am sorry, I will be more specific. You prepared a DEA Form 6, Report of Investigation, on September 16, 2004; is that correct?

A. Yes, sir.

Q. Okay. And on the first page—well, let me hand it to you.

MR. BOURGEOIS: This is for identification only, Your Honor.

THE COURT: That is Defendant's Exhibit 2.

MR. BOURGEOIS: And I premarked it 3, and I apologize.

THE COURT: We can just change the Premark. It shouldn't take that long. Ms. Moye is totally efficient when it comes to these things.

BY MR. BOURGEOIS (continuing):

Q. Do you recognize this, sir?
A. Yes, I do. It's not the finalized version, though.
[98] Q. No, sir. This says draft, correct?
A. Yes, sir.
Q. Is there something that does not say draft?
A. No, sir, it does.
Q. So, there is a final version of this with your signature on it I take it?
A. Yes, sir. It's in my bag over there.
Q. Did that final change in any material respect or is it essentially this same document that has your signature on it?
A. I would have to check to see.
Q. Well--

THE COURT: Mr. Wallner, would you bring over the case file to Detective Crawley? Mr. Bourgeois wants him to look for the original.

(Mr. Wallner complied.)

THE COURT: Thank you.

(The witness then examined the document.)

MR. BOURGEOIS: May I approach?

THE COURT: Yes. Okay. Go ahead, Mr. Bourgeois.

MR. BOURGEOIS: Thank you.

BY MR. BOURGEOIS (continuing):

Q. I just want to make sure there are no changes. Looking at the final, Paragraph 1 on Page 1 reads, reference is made to a DEA Report of Investigation prepared by TFO Dwayne Crawley, entitled Arrest of James Wright and Dante Couther, [99] dated September 14, 2004. Do you see that, sir?

A. Yes, sir.

Q. Now, there is no such document, is there, sir?

A. No, sir, not for September 14th. It should state September 17th, 2004.

Q. So, your final report with your signature on it and the signature of your boss, Priscilla Lewis, was wrong, there was a mistake in that, correct?

A. Yes, sir. We utilized—it had the date of the incident instead of the date prepared.

Q. Uh-hum. All right. Did you read this document before you signed it, sir?

A. Yes, sir.

Q. Now, you also prepared a followup DEA-6 form, correct, on September 17, 2004? Why don't you pull out the original of that, sir, the final of that, since I don't have that.

(The witness complied.)

Q. Do you have that, sir?

A. The one for the arrest, yes, sir.

Q. All right. And that is a DEA Form 6 dated September 17th, correct?

A. Yes, sir.

Q. On Page 2 of that document, sir—

THE COURT: You are referring to the September 17, 2004 DEA Form 6, Mr. Bourgeois.

[100] MR. BOURGEOIS: Yes, sir.

THE COURT: That should be marked as Defendant's Exhibit Number 3.

MR. BOURGEOIS: 3 for identification.

THE COURT: 3 for identification.

MR. BOURGEOIS: I'm sorry. Let me give it to the Clerk. This is the one that is 2 for identification.

THE COURT: Thank you.

MR. BOURGEOIS: This will be 3 for identification.

THE CLERK: Thank you. Okay.

BY MR. BOURGEOIS (continuing):

Q. Referring to your final, sir. Again, I am reading off of a draft. It's all I have been provided. On Page 2, Item 4, it says that at 3:25 p.m. the confidential source and Wright arrived at the (unintelligible) convenience store located at Harford and Hillen Road located in Baltimore, and TFO Crawley, that's you, observed Wright exit the vehicle and walk around the immediate area. Did I read that correctly, sir?

A. Yes.

Q. Now, you did not mention in here that Mr. Saffell also left the car at that time and location, correct?

A. Correct.

Q. Why did you not put that in there?

A. I did not see him leave the vehicle.

Q. Did you come to learn that he did in fact leave the [101] vehicle?

A. Yes.

Q. And you learned that before you prepared this report three days letter, correct?

A. I don't recall if it was before or after I prepared it.

Q. You viewed the videotape for the first time before or after the date you prepared this document?

A. I would have to check to see. I am not 100 percent sure.

Q. Can you tell us just sitting here today when was the first time that you learned that Mr. Saffell left the vehicle at the (unintelligible) convenience store?

A. I would probably say reviewing the videotape.

Q. Okay. Now, I think you told us earlier today that you reviewed the videotape sometime within one to five days after the date of the arrest; is that correct?

A. Yes, sir.

Q. And so it was on that occasion, within one to five days after the 14th of September, when you learned for the first time that Mr. Saffell left the vehicle outside the (unintelligible) convenience store, correct?

A. Yes.

Q. Turning to Item 4 on this document that you prepared on the 17th of September, it says that at approximately 3:40 p.m. TFO Crawley observed Mr. Wright return to the vehicle and get inside. Did I read that correctly?

[102] A. Yes.

Q. All right. So, according to your Paragraphs 4 and 5, Mr. Wright left the vehicle at 3:25 in the afternoon and returned to the vehicle at 3:40 in the afternoon, approximately 15 minutes later; is that correct?

A. Yes, sir.

Q. Now, you have since reviewed this videotape, correct?

A. Yes.

Q. Did you see how long Mr. Wright was actually out of the vehicle?

A. I didn't keep track of the time.

Q. All right. Well, here's where I have a dilemma. I might show you the videotape so we can watch it, but if I were to tell you, sir, that Mr. Wright was out of the car for four minutes, and not 15 minutes, would that surprise you?

A. No, it wouldn't surprise me.

Q. Okay. Well, when you are preparing an official DEA-6 Form of an investigation, don't you want to be accurate in what you are describing?

A. Yes, sir.

Q. Okay. And wouldn't it be important to, in terms of being accurate, when you choose to put 3:25 p.m. and 3:40 p.m., that those times be correct?

A. Yes, sir.

Q. All right. So, do you have any reason to believe that [103] those numbers, that the times you put in here are not correct?

A. That is why I use approximately. I mean, I am sure I utilized the clock that is in my vehicle when we did the surveillance.

Q. Okay. So, you believe that when you were doing the surveillance you relied on your own watch or the clock in your vehicle, and that's how you came up with this 15-minute period when you said Mr. Wright was out of the vehicle at the convenience store?

A. Yes.

Q. And if the videotape says something else, how would you explain that?

A. I don't know.

Q. Well, could one explanation be that you simply made an error when you wrote these times down in this report?

A. Yes.

Q. Okay. Now, did you actually, physically see Mr. Wright exit the vehicle at the (unintelligible) convenience store?

A. Yes, I did. I did not have fixed surveillance, meaning that I didn't have a position to where I could watch him continuously the whole time when he exited the vehicle. The way the store is positioned at Harford and Hillen Road, it's heavy traffic and not really good spots where you could actually sit to watch.

Q. Well, referring back to your DEA-6, it says TFO Crawley, [104] and you are the author of this, observed Wright exit the vehicle and walk around the immediate area, correct?

A. Yes.

Q. So, you actually had an opportunity to observe Mr. Wright walking around the area of the (unintelligible) convenience store?

A. Yes. Actually, he exited the vehicle and walked a little ways up Hillen Road.

Q. Okay. But you are telling us that notwithstanding you had sufficient opportunity to observer Mr. Wright exit the vehicle, you didn't physically observe Mr. Saffell leave the vehicle about the same time?

A. No, I did not. I was just watching Mr. Wright.

Q. Oh, okay. But you don't dispute now, having reviewed the videotape, that. Mr. Saffell did in fact leave the vehicle at the same time?

A. No, not at all.

Q. No, you don't dispute that?

A. No, I do not dispute that.

Q. Now, you also testified before a Grand Jury in this case, correct?

A. Yes.

Q. At the time you testified before the Grand Jury you had had the opportunity to review the videotape by then, hadn't you?

[105] A. Yes.

Q. But you didn't tell the Grand Jury that Mr. Saffell also exited the vehicle at the (unintelligible) Johnny store, did you?

A. No.

Q. Now, in your report on the 17th of September, you make no mention whatsoever that the vehicle stopped at another location, at the Prima Food Store, do you?

A. No.

Q. Did you know on 17th when you were surveilling this vehicle that it stopped at the Prima Food Store?

A. Yes, I did.

Q. Did you know at that time that Mr. Saffell exited the vehicle, was out of the vehicle for approximately 10 minutes?

A. During the time of the incident or—

Q. Did you learn that contemporaneously while you were surveilling the situation, did you know that Mr. Saffell was out of the car for about 10 minutes at the Prima Food Store?

A. No. I was in the process of trying to catch up with the surveillance.

Q. But, again, you reviewed the videotape and you learned that that's what happened, correct?

A. Yes.

Q. And you did not have an eyeball on Mr. Saffell during the 10 minutes he was out of the car at the Prima Food Store, [106] correct?

A. No, I did not.

Q. And you say you learned for the first time from the videotape that he was out of the car, correct, at the Prima Food store?

A. I believe so. I would say. When we are working, like myself, I'm a task force officer, I have a handheld radio, so, if I am out of the immediate range of those guys, I wouldn't get the transmission until, within that radius.

Q. Okay. And by the way, going back to the earlier stop at the (unintelligible) Johnny where Mr. Saffell got out of the car, you didn't maintain continuous eyeball surveillance on him at that time, in fact, you didn't even know until later he had gotten out of the car, correct?

A. No, sir, I didn't maintain surveillance on him.

Q. Now, to change the subject for you for a minute, going back to the videotape, you told us you put that videotape cassette into the recording device in the vehicle, correct?

A. Yes.

Q. And you also told us that at the end of the operation you removed that videotape, correct?

A. Yes, sir.

Q. Now, I take it that you then somehow put a sticker or something else on that videotape to identify the case number and the date and who collected it and you your initials on it, [107] correct?

A. No, I don't believe so.

Q. Okay. Well, what if anything did you do to that cassette tape after you removed it from the vehicle to indicate the date on which it was recorded and all of that?

A. I didn't do anything right at that time. I just maintained custody of it. We were in the process of trying to interview them, to debrief Mr. Couther and Mr. Wright.

Q. Okay. So, you did not mark that tape with your initials or any other identifying information; is that correct?

A. No, sir, I didn't.

Q. In fact, what you did is you maintained it in your custody for awhile and then you put it into a safe at your office, correct?

A. Yes.

Q. And in that safe, there are about 10 people in your office who have free access to that tape, correct —I'm sorry, to that safe?

A. Yes. I wouldn't say free access, but, yes.

Q. Access to the safe?

A. Yes, sir.

Q. And among those people are officers, law enforcement personnel who are conducting other drug investigations, correct?

A. Yes.

[108] Q. And people, law enforcement personnel who are also gathering together other videotapes, correct?

A. Yes.

Q. And that unmarked tape of yours sat in that safe anywhere from one to five days before you retrieved it to review it for the first time, correct?

A. Yes.

Q. Now, you noticed in reviewing the videotape for the first time it was date stamped, correct?

A. Yes, sir.

Q. And that was completely wrong, correct?

A. Yes. The date and time was incorrect.

Q. It was off by (unintelligible)?

A. It was incorrect.

Q. And about 13 hours?

A. Yes.

Q. And that was a mistake, also, correct?

A. Yes. We don't maintain that equipment, though. It's maintained through the Technical Unit.

Q. The Technical Unit of who?

A. Of the Drug Enforcement Administration. There are technical agents that are assigned to the Baltimore District Office.

Q. And you told us earlier I think that you are attached to HIDA?

[109] A. Yes, sir.

Q. Okay. And HIDA is a cooperative effort among different law enforcement agencies, correct?

A. Yes, sir, various agencies throughout the Baltimore metropolitan area.

Q. And this was a HIDA effort in this case, correct?

A. Correct.

Q. And that brought together you from the Baltimore City Police Department and people from the Drug Enforcement Agency and the like, correct?

A. Yes.

Q. And the equipment that this outfit was using on this bust was this equipment, correct?

A. Yes.

Q. But you are saying that it's some other agency's and some other officer's job to take care of it, correct, not yours?

A. No. I am saying they maintain the equipment just like they maintain that vehicle that was utilized as far as its well being.

Q. Well, this videotape is not the only tape we know about, correct?

A. No, sir.

Q. You told us earlier that Sergeant Smith had a conversation earlier in the day before people got in the car and drove around and did what they did; is that correct? He [110] taped an earlier conversation?

A. Yes, sir.

Q. He taped a conversation between Mr. Saffell and Mr. Wright according to Sergeant Smith, correct?

A. Yes, sir.

Q. And he did that in your presence?

A. Yes.

Q. And that tape then was taken in your presence by Sergeant Smith, correct?

A. Yes.

Q. And that tape contained evidence pertinent to this case, correct?

A. Yes.

Q. And it contained conversations that allegedly would demonstrate some intent on the part of these two individuals to put together some sort of drug deal, correct?

A. Correct.

Q. And you now know that Sergeant Smith managed to lose that tape, correct?

A. Yes, because of unforeseen circumstances.

Q. What were the unforeseen circumstances?

A. He was transferred back to the sixth floor of Baltimore City, the Narcotics Section, Baltimore City.

Q. Are you saying he was transferred with no notice whatsoever?

[111] A. Yes.

Q. In any event, Sergeant Smith lost the evidence, correct?

A. Yes.

Q. And that's another mistake by law enforcement in this case, correct?

A. Yes, sir.

Q. Now, Mr. Saffell was also equipped with a body wire, correct?

A. Yes, sir.

Q. Who put that on him?

A. Sergeant Smith gave him that monitoring device.

Q. Have you listened to the tapes of that body wire?

A. We just made copies of them. I did not listen to them.

Q. So you don't have any personal knowledge about the quality of those tapes, correct?

A. Of those tapes, no.

Q. Who handed the money to Mr. Saffell, the government funds?

A. I did.

Q. What were the denominations of the bills?

A. I believe they were $50. Yes, sir, they were $50 bills.

Q. They were all $50 bills?

A. Yes, sir.

Q. And you had searched Mr. Saffell to ensure he had no other money on him, correct?

[112] A. No, I didn't search Mr. Saffell. Sergeant Smith did.

Q. Okay. Well, you were here today when Sergeant Smith testified, correct?

A. Yes.

Q. Did he search him in your presence?

A. Yes, it was in my presence.

Q. And it's your understanding, based on Sergeant Smith's testimony and the fact that this search was done in your presence, that Mr. Saffell had no other money on him on that day; is that correct?

A. Yes.

Q. Yet, you also learned today from Mr. Saffell's own mouth that he managed to go into (unintelligible) and purchase cigarettes and sodas, correct?

A. Correct.

Q. Did you authorize him to use government funds to start buying stuff, personal items?

A. No.

Q. Did you authorize Mr. Saffell, by the way, to leave the car and leave video surveillance at any time?

A. We didn't authorize him, but we didn't limit him either.

We know during drug investigations the ideal situation was for the defendant to enter the vehicle and have the drug transaction take place in the vehicle, but sometimes guys won't get in the vehicle or they may ask the confidential [113] source to get in their vehicle or do it outside, things of that nature. That's why we equipped him with the Kel set, also.

Q. Did you, by the way, in reviewing the tape, hear Mr. Saffell say he was going to give Mr. Wright a $20.

A. Yes, I did.

Q. Well, he didn't have a $20 bill on him to go into the (unintelligible) Johnny, did he?

A. I don't know.

Q. Well, he shouldn't have, shouldn't have had any money other than the $50 bills the government gave him, correct?

A. Correct.

Q. So, is it possible that Mr. Saffell somehow smuggled $20 or some other cash into that vehicle?

A. It's possible.

Q. Is it possible that Mr. Saffell brought drugs into that that you guys didn't find, into that vehicle?

A. It's possible.

Q. Now, you requested in the DEA Form 7 that Midatlantic Laboratory or some other laboratory conduct a fingerprint analysis on the drugs that Mr. Saffell provided you guys, correct?

A. Yes, sir, I did.

Q. And at no point did anybody report back that Mr. Wright's fingerprints were found on that evidence; is that correct?

[114] A. That is correct. They sent me—

Q. That's all—

THE COURT: The witness hasn't answered the question. Finish your answer, sir.

A. They sent me a form stating that they would require an FBI number or fingerprint cards. I gave them Mr. Wright's and Mr. Couther's FBI and State identification information. They sent the form back saying that there were no suitable prints found on the CDS.

Q. On the CDS. So, there were no suitable prints found belonging to Mr. Wright on the drugs; is that correct?

A. Correct.

Q. On the drug packaging material, correct?

A. Correct.

Q. How about Mr. Couther?

A. There were no suitable prints.

MR. BOURGEOIS: Bear with me one moment, please. (Pause in the proceeding.)

BY MR. BOURGEOIS (continuing):

Q. Now, getting back to the DEA Form 6 that you prepared on the 17th of September, please turn to Page 2 of 4. In Paragraph 7 it reads in, the second sentence, "The CS . . . ", that's Mr. Saffell, " . . . handed the $2,000 serialized OAF—" that's the government's money, "to Couther."

Did I read that correctly, sir?

[115] A. I am sorry. You said prepared on the 17th?

MR. BOURGEOIS: Again, I only have the draft.

MR. WALLNER: Here.

(Pause in the proceeding.)

MR. BOURGEOIS: We will use Mr. Wallner's copy.

BY MR. BOURGEOIS (continuing):

Q. Paragraph 7, the second sentence: "The CS . . . ", Mr. Saffell, " . . . handed the $2,000 serialized OAF to Couther." Did I read correctly?

A. Yes.

Q. Now, you heard Mr. Saffell testify a few minutes ago that he handed the money to Mr. Wright?

A. Yes, I did.

Q. Did you observe who handed the money to whom?

A. No, I did not.

Q. Why did you state in this DEA Report of Investigation that Mr. Saffell handed the money to Mr. Couther?

A. After the investigation was over, we debriefed Mr. Saffell, and Mr. Saffell stated that he had handed the money to Dante Couther.

Q. And, in fact, as Mr. Saffell testified today, he also stated early in his testimony, rather than late in his testimony, that he handed the money to Mr. Couther, did you hear this, but was a. little concerned because he didn't want to be fronting money?

[116] A. Yes.

Q. All right. So, you heard Mr. Saffell testify today as to two versions of the person to whom he handed the money, correct?

A. Yes.

Q. Now, were you present when Mr. Wright was arrested?

A. No, sir.

Q. Do you know what officer actually executed the arrest on Mr. Wright?

A. No, sir.

Q. Do you know what documents were seized from Mr. Wright at his arrest?

A. No, sir.

Q. You do know, of course, that there was no money found on Mr. Wright?

A. Yes, sir, there was no money.

Q. And also there was no money seized from Mr. Couther, correct?

A. Correct.

Q. And there was no law enforcement officer as far as you could tell who actually saw Mr. Couther and Mr. Saffell exchange money or drugs; is that correct?

A. Correct.

MR. BOURGEOIS: I have no further questions, sir.

THE COURT: Any redirect, Mr. Wallner.

[117] MR. WALLNER: I just have a couple of questions, Your Honor.

THE COURT: All right. In terms of the schedule here, how long do you think it will take.

MR. WALLNER: Five minutes.

THE COURT: You have five minutes. It is 4:55. We have to be finished by 5 o'clock. Go ahead.

MR. WALLNER: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. WALLNER:

Q. Detective Crawley, you indicated that the evidence was submitted for fingerprint analysis, correct?

A. Yes.

Q. And you were advised by the laboratory that no suitable latent prints were recovered; is that correct?

A. Correct.

Q. Have you heard that term before, suitable latent prints?

A. Yes.

Q. Can you explain to the ladies and gentlemen of the jury what your understanding of that term means?

A. My understanding is that they recovered prints and maybe partial prints, but they were not able to be analyzed to correctly say who they belonged to.

Q. Okay, that's fine. Additionally, sir, Mr. Bourgeois asked you about this individual, Eric Wright; is that correct?

[118] A. Yes.

Q. You actually used the name Eric Wright in a search and seizure warrant; is that correct?

A. Yes, I did.

Q. The search and seizure warrant you prepared, whose dwelling was that for?

A. That was for Dante Couther's residence.

Q. Not an Eric Wright?

A. No.

Q. And not James Wright, correct?

A. No.

Q. Can you explain to the ladies and gentlemen of the jury where the term Eric Wright, or the name Eric Wright came from?

A. It was an error on my behalf from a cut-and-paste job from a previous search and seizure warrant.

Q. Finally, sir, Mr. Bourgeois asked you about this Statement of Probable Cause which was filed in Baltimore County; is that correct?

A. Yes, sir.

Q. At that point, Detective (unintelligible) from Baltimore County allegedly whited something out; is that correct?

A. Yes.

Q. Did you white that out?

A. No, sir.

Q. Was Mr. James Wright ever prosecuted in Baltimore County?

[119] A. No.

MR. WALLNER: Nothing further.

MR. BOURGEOIS: May I approach very briefly, Your Honor.

THE COURT: Yes.

(The following colloquy then took place at the bench.)

MR. BOURGEOIS: Sergeant Smith testified that $10s and $20s were the currency provided to the confidential informant. Detective Crawley actually prepared the serialized numbering.

He indicates nothing but $50s. I saw that obviously for the first time because it was not provided. I would ask that the Court permit me to move into evidence—

THE COURT: (Unintelligible).

MR. BOURGEOIS: (Unintelligible).

THE COURT: (Unintelligible).

MR. BOURGEOIS: (Unintelligible).

(The following then took place in open court.)

THE COURT: What item do you want to move into evidence, Mr. Bourgeois?

MR. BOURGEOIS: I would like to take this gentleman's original file and simply admit into evidence—

THE COURT: The other ones are just marked for identification, but on this you are thinking to move it into [120] evidence?

MR. BOURGEOIS: I would actually like it in evidence.

THE COURT: This will be Defendant's Exhibit Number 4.

THE CLERK: Yes.

THE COURT: All right. This item will be in terms of the serial numbers of the currency.

MR. BOURGEOIS: That's correct.

THE COURT: All right. So, that will be Defendant's Exhibit Number 4.

MR. WALLNER: Your Honor, can I prevail upon your Clerk to make a real quick copy of this.

THE COURT: Yes. We can do the housekeeping after. We don't have to keep the jury for that.

MR. BOURGEOIS: Thank you, Your Honor.

THE COURT: All right. Defendant's Exhibit Number 4 will be admitted into evidence with no objection from the government, and the other three Defendant's Exhibits were just for identification only, correct, Mr. Bourgeois?

MR. BOURGEOIS: That's correct, Your Honor.

THE COURT: Okay. So, 1, 2 and 3 are for identification only, and 4 will be in evidence. So admitted. Anything else, Mr. Bourgeois?

MR. BOURGEOIS: I'm sorry, that's not accurate. One [121] of them was admitted. That was the Statement of Charges.

THE CLERK: Yes, Defendant's 1 is in evidence, 2 and 3 are only marked for identification, and 4 is in evidence.

THE COURT: Once again, I thank Ms. Moye for her thoroughness in keeping things straight here.

MR. BOURGEOIS: I also thank her. She is terrific.

THE COURT: Any further questions of Detective Crawley, Mr. Bourgeois?

MR. BOURGEOIS: I have no further questions, Your Honor.

THE COURT: Detective Crawley, you may step down and take your documents with you.

(Witness excused.)

THE COURT: Ladies and gentlemen, if you just wait one second, we are trying to get you out before the rush hour gets too bad, but it might clarify some matters for scheduling. Bear with us for one second. Hold on for one second.

Counsel, if you will approach the bench, please.

(The following colloquy then took place at the bench.)

THE COURT: (Unintelligible), Mr. Wallner, for scheduling.

MR. WALLNER: I may try to locate one or two witnesses, but I don't anticipate them being lengthy at all.

[122] They will be some surveillance witnesses. I don't think they are absolutely necessary. The only issue would be, I want to rest now but—

THE COURT: In terms of Mr. Wright, is he going to testify?

MR. BOURGEOIS: I suspect that he is not, but I have not confirmed that.

THE COURT: If he testifies—

MR. BOURGEOIS: I don't believe so.

THE COURT: (Unintelligible).

MR. BOURGEOIS: (Unintelligible) 9 o'clock tomorrow (unintelligible).

THE COURT: (Unintelligible) and determine if there is anything further from the government. We will go over instructions (unintelligible) tomorrow, talk to your client (unintelligible). (Unintelligible).(Unintelligible) back at 10 tomorrow (unintelligible) case tomorrow, have closing arguments tomorrow, though let (unintelligible) told them tomorrow.

MR. BOURGEOIS: Your Honor—

THE COURT: (Unintelligible) due back here tomorrow. (The proceeding then resumed in open court.)

THE COURT: Ladies and gentlemen, you will be due back here tomorrow and resume the jury box at 10 o'clock. It is possible that we will have the case submitted to you for [123] your deliberations and not Thursday. So, there may or may not be the scheduling problem with at least the one juror as I feared. It just depends, but it's possible that you will get the case tomorrow and we will have to wait and see on

that, but I give you that advice. So, as long as you are here, we are going to do our very best to have you here in the jury box and start promptly at 10 o'clock tomorrow morning.

We will be in about a 10-minute recess counsel, and then we will be back in 10 minutes for some other legal matters.

COUNSEL: Thank you, Your Honor.

(The recess was then taken.)

THE COURT: Thank you. Do you all want to be seated.

We have a draft of the instructions, which I have given to counsel. You each have a copy now; is that correct?

MR. WALLNER: Yes, Your Honor.

MR. BOURGEOIS: Yes, Your Honor.

THE COURT: What I want to do is let me begin by noting this, counsel: One of the things that I continually hear from jurors is the length of jury instructions. One juror has stated this, and I have repeated my problem with other jurors and they have always confirmed, I recall one juror telling me a year ago that it was brain numbing, it just numbed her after awhile to kind of listen to legal [124] instructions, and from my notes, none of these jurors have had jury experience before.

MR. WALLNER: That's right.

THE COURT: Generally, the jurors arrive, they have seen television. Much of what they seen they anticipated.

They certainly see lawyers who are far better than the TV lawyers and far more professional and courteous to one another than some of these actors that scream and yell in the courtroom, but that is another matter. But, they are not ready for the jury-instruction process. So, I just throw this out.

I mean, Mr. Wallner has had cases with me before. Mr. Bourgeois, you did not. I try to get these redacted down because I think it does not serve anyone well, including the defendant, if a jury sits with so many instructions that they really don't have time to focus on the ones that I think are truly important. So, I just throw that caveat out in terms of trying to keep them reasonably concise.

Now, in the final draft, they will not be printed on both sides. In the final draft, they will just be printed on one side. What I was going to quickly do is go through, and we will just maybe take 10 minutes, and I promise we will do our best to go through in 10 minutes just the instructions. I will ask the government if it has a problem, defense if it has a problem, and if you do, fine, we will leave it for tomorrow [125] morning. We are just going to go through certain boilerplate items. Is that agreeable to the government?

MR. WALLNER: Yes, Your Honor.

THE COURT: The defense?

MR. BOURGEOIS: Yes, Your Honor.

THE COURT: Okay. Instruction Number 1 is boilerplate. I assume there is no problem from anyone. Just indicate no objection each time.

The government?

MR. WALLNER: None, Your Honor.

MR. BOURGEOIS: I have no objection.

THE COURT: Number 2, role of the Court?

MR. WALLNER: None, Your Honor.

MR. BOURGEOIS: No, Your Honor.

THE COURT: Number 3, role of the jury?

MR. WALLNER: None from the government.

MR. BOURGEOIS: I don't believe you asked any questions of the witnesses.

THE COURT: That's right, and we had this highlighted. That black portion, the highlight black portion will be taken out, because I didn't ask any questions, and that will be taken out.

MR. BOURGEOIS: No objection, Your Honor.

THE COURT: All right. Four?

MR. WALLNER: I'm sorry. None, Your Honor.

[126] MR. BOURGEOIS: None, Your Honor.

THE COURT: Five.

MR. WALLNER: None.

MR. BOURGEOIS: None, Your Honor.

THE COURT: All right. Six? I don't think that is really applicable.

MR. WALLNER: Your Honor, I don't think so either.

THE COURT: Mr. Bourgeois, do you have any strong feelings about that instruction being given?

MR. BOURGEOIS: About the objections? About conduct of counsel? I'm sorry.

THE COURT: Yes.

MR. BOURGEOIS: No. I think that the instruction should be given. I have no objection to it.

THE COURT: All right. I will take out the highlighted black portion because there is no issue about (unintelligible) officer's testimony.

MR. BOURGEOIS: Yes.

THE COURT: The rest of it will be given. We will take out the highlighted black portion.

Seven?

MR. WALLNER: I object to that one.

THE COURT: That's the presumption of innocence. Now we are laughing. I know we are getting tired.

No objection from the government, correct?

[127] MR. WALLNER: None, Your Honor.

THE COURT: The defense obviously has no objection.

MR. BOURGEOIS: No objection, Your Honor.

THE COURT: Eight?

MR. WALLNER: No objection, Your Honor.

THE COURT: The defense?

MR. BOURGEOIS: No objection, Your Honor.

THE COURT: All right. Nine?

MR. WALLNER: No objection.

MR. BOURGEOIS: No objection.

THE COURT: Ten?

MR. WALLNER: I have no objection. That's Mr. Bourgeois.

THE COURT: That's right.

MR. BOURGEOIS: No objection, Your Honor.

THE COURT: Now, Mr. Bourgeois, make sure you talk with your client. I will give an advisory—your client his rights tomorrow, but the main point is to make sure that he—I believe the instruction should be given. If he affirmatively asks me not to give it and not to comment upon his not testifying, you should just address that with him and remind me of that tomorrow when I advise him, and I will confirm that he wants me to give an instruction. Sometimes, defense counsel—I don't think it is a good position, but sometimes defense counsel take the position they don't want it [128] to be discussed.

MR. BOURGEOIS: Right, it highlights it. One question, Your Honor: It is practice to qualify him, correct, or advise him?

THE COURT: Yes. Well, I can advise him.

Essentially, I advise him of his satisfaction with counsel, if there is anything he asked you to do which you have not done, his understanding that the jury has to be unanimous in their verdict on each count, that the jury will be instructed that there is never any burden upon him.

Basically, I will explain to him in Court's Instruction Number 10 there is no burden upon him. The jury will be instructed. I will advise him of the right to the compulsory process of witnesses, that you could submit a subpoena and require people to come into court. Essentially I cover most of the points under Rule 11 of the Rearraignment Procedure to make sure he is aware of all those rights.

So, yes, I will attend to that. If you think I have missed anything, you certainly—

MR. BOURGEOIS: I ask for the simple reason that in some Courts, I don't think in the Federal Courts, they ask the defense to do it. I much prefer the Court to do it.

THE COURT: I concur.

Court's Instruction Number 11, direct and circumstantial evidence?

[129] MR. WALLNER: No objection, Your Honor.

MR. BOURGEOIS: No objection, Your Honor.

MR. WALLNER: No objection to 12, Your Honor.

THE COURT: Any objection, Mr. Bourgeois?

MR. BOURGEOIS: To 12? No, Your Honor.

THE COURT: All right. Thirteen?

MR. WALLNER: No objection.

MR. BOURGEOIS: No objection, Your Honor.

THE COURT: I don't know that this instruction should be given. There are no stipulations and judicially-noticed facts. So, I think the highlighted portions in black are taken out and this instructions is just what is not highlighted in black.

MR. WALLNER: Yes, Your Honor.

MR. BOURGEOIS: I agree, Your Honor, and no objection, Your Honor.

THE COURT: All right. I thank my law clerk, Ezra, for preparing it in that fashion. It is helpful.

Court's Instruction Number 15, witness credibility, I have a note here that I have an objection to that

because it is incredibly long and I have never been able to figure a way to get it shorter. That's my basic witness credibility instruction, which is the standard out of Sand & Siffert.

MR. WALLNER: Yes, Your Honor, that's fine.

MR. BOURGEOIS: I am reviewing it, Your Honor.

[130] THE COURT: Take your time.

(Pause in the proceeding.)

MR. BOURGEOIS: No objection, Your Honor.

THE COURT: Expert witness instruction, we are going to need that.

MR. BOURGEOIS: No objection.

MR. WALLNER: No objection from the government. I don't have any objection to that.

THE COURT: The next instruction, we don't have it numbered here. For some reason the number is missing, but (unintelligible) sometimes they change. Court's Instruction 15 is witness credibility. Expert witness is 16. The next one is 17, impeaching by felony conviction. That is applicable in later cross-examination of Mr. Saffell, so that one will be given.

MR. BOURGEOIS: No objection, Your Honor.

THE COURT: Court Instruction Number 18, impeachment by prior inconsistent statement— I'm just looking for a way to keep these shorter. Is that really an issue here?

MR. WALLNER: I'm not aware of any prior inconsistent statement.

THE COURT: Mr. Bourgeois, were there any prior inconsistent statements?

MR. BOURGEOIS: I'm trying to think whether—

THE COURT: I think there was a prior inconsistent [131] statement by Saffell that you highlighted—you attempted to highlight, so I think it has to be given.

MR. BOURGEOIS: I think that's true, Your Honor. I was also thinking of another one, but—

THE COURT: I think that 18 has to be given. The next one, law enforcement witness, 19, any objection by the government.

MR. WALLNER: No, Your Honor.

THE COURT: The defense?

MR. BOURGEOIS: No objection.

THE COURT: All right. Instruction Number 20 was indictment is not evidence.

MR. BOURGEOIS: No objection.

MR. WALLNER: No objection.

THE COURT: All right. Twenty-one?

MR. WALLNER: No objection.

MR. BOURGEOIS: No objection.

THE COURT: The next instruction had failure to name a defendant. That's really not applicable in this case.

MR. WALLNER: No, it's not.

THE COURT: So, that should come out. All right, Mr. Bourgeois? The failure to name a defendant Sand & Siffert 3-4, I don't think that's applicable in this case.

MR. BOURGEOIS: I think because of law meaning that Saffell can't be a conspirator as a matter of law, but that [132] probably should not lead to have it in there.

THE COURT: All right. Then the next instruction, which is now numbered as Number 22, multiple counts.

MR. BOURGEOIS: No objection.

MR. WALLNER: Is this 22, Your Honor?

THE COURT: It's now 22. It's multiple counts, one defendant.

MR. WALLNER: That's fine, Your Honor.

THE COURT: Okay. 23 is knowingly Sand & Siffert 1, any objection by the government.

MR. WALLNER: No, Your Honor.

THE COURT: Defense.

MR. BOURGEOIS: No, no objection.

THE COURT: The next one is Court's Instruction Number 24, knowledge, wilfulness and intent, Sand & Siffert 6-17.

MR. WALLNER: No objection, Your Honor.

THE COURT: Now, the next instruction is disregard the disposition of co-defendant's case.

MR. WALLNER: There was no mention of a co-defendant.

THE COURT: Does the government want this instruction?

MR. WALLNER: There was no mention of it, so I am not quite sure—I think it would be more confusing than [133] helpful.

THE COURT: Well, there really has not been any mention of the defendant in the case. They are going to get a verdict sheet. They are not going to have the indictment. Mr. Bourgeois, how do you feel about this.

MR. BOURGEOIS: I think the second sentence should be important because Mr. Couther was brought up. Mr. Saffell kept referring to him as the defendant.

THE COURT: All right. I will give the instruction.

MR. WALLNER: I actually kind of agree it probably should be given.

THE COURT: We will make that 25, and that should be given.

MR. BOURGEOIS: I object to the next one, Your Honor.

THE COURT: I am sure you do.

MR. WALLNER: I honestly want that one.

THE COURT: I think it's an appropriate instruction. Court's Instruction Number 26, all available evidence need not be produced, the law does not require the prosecution to call as witnesses all who may have been present at anytime. That will be given.

Now, the next one, I don't know that this one is applicable, uncalled witness equally available, Sand & Siffert 6-7. I don't think that is an issue in this case.

[134] Mr. Wallner, from the point of view of the government, do you want this instruction?

MR. WALLNER: I'm sorry. The Court's indulgence.

THE COURT: It's uncalled witness equally available.

MR. WALLNER: Actually, Your Honor, I would like that instruction given.

THE COURT: Then perhaps it is a request the government has made. What I will do is I will look at my boilerplate. I will also try to incorporate generally requests and then we go from there. From the point of view of the defense?

MR. BOURGEOIS: Well, from the point of view of the defense, if I rest without calling witnesses, then I do not believe this instruction should be given because the defendant has absolutely no burden to put on any evidence. I think it may change a little bit if I were to start putting on an affirmative defense through witnesses' testimony after the government closes.

THE COURT: I think that is a point well taken. Then this instruction won't be given unless you present witnesses.

MR. WALLNER: My only point is that one of the things that may be brought up, and I think unfairly, I am not saying this is what Mr. Bourgeois' approach on it would be, is that the government did not produce all 11 people that were [135] part of the surveillance who would hence testify extensively the same way that the surveilling agents did in this case. I could parade those witnesses in here, but I think that would be a waste of the Court's and the jury's time.

THE COURT: I think it is a waste of time. Mr. Bourgeois, that is a point well taken, is it not, that (unintelligible) there are people out there who didn't

come in here as witnesses? You could call whoever you wanted to as witnesses to pursue this matter or gaps. You have established some gaps in terms of the people keeping the eye, the law enforcement keeping what they call the eye on the vehicle.

MR. BOURGEOIS: Well, I do intend, frankly, because we had testimony from Detective or Officer Flickinger, for example, who said that there were moments, may have been momentary lapses. And I don't know, and I probably will say, frankly, is one reason I had the officers identify each of the multiple persons there.

THE COURT: Then Court's Instruction Number 27, that will be given. Your exception will be noted. Again, that will be noted.

MR. BOURGEOIS: Thank you, Your Honor.

THE COURT: Reasonable doubt, there is no reasonable doubt instruction required under Fourth Circuit law, so I am not going to give an instruction pursuant to instructions from the Fourth Circuit on reasonable doubt.

[136] MR. BOURGEOIS: Your Honor, just for the record, I do request such an instruction. I think Fourth Circuit law does not prohibit it. It frowns upon it unless the jury seeks guidance. I know a number of other circuits do require a reasonable doubt certainly upon request of the defense. For the record, I understand where you have to go or feel you must go, but I believe the defendant should have a reasonable doubt instruction. We almost got to the Supreme Court on that issue. Almost.

THE COURT: Almost. Just for the record, as Magistrate Judge Carl Horn has noted in his biblical

book, "Fourth Circuit Criminal Handbook", which all the District Judges in this circuit make reference, and the record should reflect we are all grateful to Judge Horn for his continued scholarship in this regard, it is noted in Section 253C of that treatise that the Fourth Circuit has repeatedly held that a District Court need not and should not define the term reasonable doubt even upon request. Most recently *United States v. Williams*, 152 F.3d 24, Fourth Circuit 1998, and in accord with that opinion is the more recent case of *United States v. Quinn*, Q-u-i-n-n, 359 F.3d 666 at 676, Fourth Circuit 2004, and the case of *United States v. Najjar* at 300 F.3d 466, Fourth Circuit cert., denied by the Supreme Court at 537 US1094 in 2002.

So, essentially the cases hold that even when [137] requested it is not already and is probably preferable for the trial Court to refuse to define or clarify the meaning of reasonable doubt as noted by the case of *United States v. Walton*, Fourth Circuit opinion, 207 F.3d 694, cert. denied, 531 US 865. Essentially those cases strongly suggest and indicate that the Court should not define reasonable doubt, so I will not do so. So, that instruction will not be given, and your exception is noted, Mr. Bourgeois.

If the jury were to ask a question with respect to that we may or may not have to readdress that issue. I don't know that the Fourth Circuit has specifically held that the Court cannot make some effort if it's asked at some point in time.

MR. BOURGEOIS: In fact, I believe the Fourth Circuit has so indicated, but in any event, my exception is noted and I appreciate that, Your Honor.

THE COURT: Certainly, if you want to find that Fourth Circuit case for me where the Fourth Circuit has specifically said that I can make a response if I am asked let me know if that comes up.

MR. BOURGEOIS: Yes, Your Honor. And to be clear, I believe that Fourth Circuit case says if the jury requests, not the defendant requests.

THE COURT: Right, if the jury requests.

MR. BOURGEOIS: If that were to arise, I will [138] certainly forthwith deliver it.

THE COURT: Thank you. The next instruction will be the Court's Instruction Number 28, number of witnesses and uncontradicted testimony, the fact that one party called more witnesses. No objection by the government?

MR. WALLNER: No, Your Honor.

THE COURT: The defense?

MR. BOURGEOIS: No.

THE COURT: All right. The specific investigative techniques, Sand & Siffert 4-4—

MR. WALLNER: I would request that, Your Honor.

THE COURT: Yes. I think in light of your cross-examination on the issue of fingerprints, Mr. Bourgeois, that instruction should be given.

MR. BOURGEOIS: Well, Your Honor, I think I disagree simply because they said that they did check for fingerprints and there were no readable prints. It's not that the analysis was not done. So, I don't know that this instruction covers that situation. Had they said, yeah, we asked for a fingerprint analysis and it was not done, then that is a different scenario.

THE COURT: I understand your exception. It will be given.

Clearly the next instruction, Number 30, is consistent with what I have already told them and that should [139] be given.

Any objection by the government?

MR. WALLNER: No, Your Honor.

THE COURT: The defense.

MR. BOURGEOIS: No, Your Honor.

THE COURT: The next one on charts and summaries, we don't have charts and summaries, so that should not be given.

MR. WALLNER: I don't think we are going to have any either.

THE COURT: All right. There is no similar act instruction that need be given. The government did not offer evidence to show that on a different occasion the defendant engaged in conduct similar to the charges in the Indictment.

It was admitted, Saffell was permitted to testify just in terms of a prior relation. In fact I have instructed the jury that's the only manner in which it can be considered, so I see no reason for a similar act instruction, Sand & Siffert 5-25.

MR. BOURGEOIS: Your Honor, again, I would object to that. I think your ruling on the motions I guess is the best way to characterize it, in limine, your ruling was, as I understand it, that the proffered testimony by Mr. Saffell was perhaps relevant as to the motive and intent, as well as the conspiracy itself, but as a subsidiary matter under 408(b). I'm sorry, if you found it relevant under 402—

[140] THE COURT: 401.

MR. BOURGEOIS: 401 of the conspiracy, but as a subsidiary ruling you held under 408(b) that it could come in as a similar prior act and—

THE COURT: I guess the point is, the way the testimony came in, Mr. Bourgeois, is that it was clearly just a prior relationship and prior dealings. We didn't even get into specific acts. Now, if you want me to give that, I will consider giving it, but I don't know that it—it clouds the issue. I have already told the jury strictly, as you asked me to do, it's strictly the matter of the context of Saffell's relationship with Mr. Wright and nothing else. The government has not offered evidence to show on different occasions—

MR. WALLNER: Your Honor, just so the Court is not misled, there was at least on my redirect of Mr. Saffell, the indication that a prior relationship did exist.

THE COURT: If the defense wants me to give it, I will give the instruction. I will give—

MR. BOURGEOIS: I am on the fence. I think it would be given.

THE COURT: Court's Instruction Number 31, Sand & Siffert 5-25. Madam Clerk and Court Reporter, if you just bear with us a little bit longer, we are making progress here. I apologize.

Court's Instruction Number 32, impermissible to [141] infer participation from mere presence, any objection from the government?

MR. WALLNER: None, Your Honor.

THE COURT: The defense?

MR. BOURGEOIS: None.

THE COURT: Also, the next one on impermissible to infer participation from association, any objection by the government?

MR. WALLNER: No, Your Honor.

THE COURT: The defense?

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. 34, there's no reason for a motive instruction here.

The next one, 6-18, any objection from the government if we do not have using motive or intent?

MR. WALLNER: I don't believe so, Your Honor.

THE COURT: I don't think it's necessary, Mr. Bourgeois.

MR. BOURGEOIS: I agree.

THE COURT: All right. The next instruction will not be given unless the defendant testifies, and the Clerk will just tag that in case the defendant does decide to testify. That would have been 7-4 in terms of Sand & Siffert.

In terms of accomplices called by the government, I don't think that is applicable. We are talking about—

[142] MR. WALLNER: Mr. Saffell cannot be an accomplice.

THE COURT: That's right, he's not an accomplice. That instruction 7-5 will not be given.

Unindicted coconspirator, he is not a coconspirator. There is no unindicted coconspirator, so 7-7 should not be given.

The next instruction would have been Sand & Siffert 7-9, informal immunity of government witness. Mr. Bourgeois, do you want that instruction?

MR. BOURGEOIS: Well, I am trying to figure out how to cover the ground generally, because he doesn't fall into a lot of these categories.

THE COURT: I think there's informal immunity being given to him with respect to this particular—well, actually he hasn't committed a crime. I don't know that there—there's no indication of immunity having been afforded to Saffell.

MR. WALLNER: Well, there was, but that was in a previous case. I think that instruction would be more appropriate in the case when he testified in *U.S. v. Keenan* as opposed to this case where he was not afforded immunity. I think the standard bias, prejudice and government informant—

THE COURT: I don't think this instruction on immunity is necessary.

The witness using or addicted to drugs, that's not [143] applicable in this case. Do you agree, Mr. Wallner?

MR. WALLNER: I agree, although Mr. Bourgeois did bring out that Mr. Saffell has used in the past marijuana and may or may not—

THE COURT: But there is no indication of addiction. Mr. Bourgeois, do you want this instruction?

MR. BOURGEOIS: I think I do, Your Honor. He testified—he acknowledged that he lives for drugs, that his memory is impaired by the use of drugs.

THE COURT: That's fine. I will give that instruction. That will be Court's Instruction—I think that's

Instruction Number 34. That's Instruction Number 34, and that will be given.

The next matter is Sand & Siffert Number 7-13, impeachment of defendant won't be applicable, I don't believe. If he testifies, we will have to deal with that.

There's no indication of government informers in this case, is there, Mr. Wallner?

MR. WALLNER: I'm sorry. The Court's indulgence.

THE COURT: It's Page 53 of the ones—we don't have a government informer issue in this case.

MR. WALLNER: Well, actually, I don't know how you would characterize Mr. Saffell, then.

THE COURT: He is a cooperating witness, but I don't know that he is a government informer.

[144] MR. WALLNER: Well, Your Honor, I think he is involved in—I'm sorry.

THE COURT: All right. 35 will be given. Government informant will be given.

MR. WALLNER: Your Honor, I will look at this and let you know for sure, but—

THE COURT: Number 35, Mr. Bourgeois, do you want that one?

MR. BOURGEOIS: I do.

THE COURT: All right. We don't have to discuss it at great length. It will be given.

Identification testimony, is that really an issue in this case?

MR. WALLNER: Not from my point of view, no.

THE COURT: Mr. Bourgeois, is that an issue in this case? I don't think it is, is it?

MR. BOURGEOIS: I will except to your decision not to put it in.

THE COURT: Okay. So, we don't need to put that in.

I think prior perjury, there is no evidence that a witness who has testified at trial lied under oath in another proceeding.

MR. WALLNER: No, Your Honor, there's not.

THE COURT: So, this is not applicable. You certainly, Mr. Bourgeois, in closing, will be permitted to [145] argue the violation of the plea agreement, what have you, but that is not perjury under oath, so that is not an applicable instruction.

MR. BOURGEOIS: Your Honor, I think I would request something akin to this. I agree that there is not evidence of perjury in a prior proceeding. We do have an admission that this man violated his agreement and violated his promises. I think the second half, the second two sentences of this instruction are important. You know, the testimony of a witness who acknowledged on the stand that he lied to law enforcement and broke his promises to law enforcement must be viewed carefully and weighed with great care.

THE COURT: Mr. Wallner?

MR. WALLNER: Well, Your Honor, I am not quite sure that that is the appropriate instruction. I think in general—

THE COURT: Why don't we tag that one and, Mr. Bourgeois, why don't you come up with some suggested language—

MR. BOURGEOIS: Yes, sir.

THE COURT:—and Mr. Wallner can indicate whether he agrees with that or not, and I will certainly address that. I think in light of this witness having violated his plea agreement and having spun, to some extent, law enforcement officials, an instruction should be given along those lines, [146] but it's not perjury. We will mark that one as Number 36, and it will have to be modified.

Thirty-seven is the charges, and I will read the charges.

MR. BOURGEOIS: No objection.

MR. WALLNER: No objection, Your Honor.

THE COURT: The next one, purpose of statute, conspiracy, the standard instruction, no objection by the government obviously?

MR. WALLNER: No, Your Honor.

THE COURT: No objection by the defense?

MR. BOURGEOIS: No.

THE COURT: Purpose of the statute, Count 1, that will be Instruction Number 38.

Then the next one, elements of conspiracy, that will be 39.

MR. WALLNER: Your Honor, I don't want to gloss this over, but this is a modified instruction from Sand & Siffert, and it is generally given in this courthouse, but I note in one of Mr. Bourgeois' filings he requested the standard Sand & Siffert instruction.

This instruction kind of takes into account Element Number 3 and Element Number 4 and kind of puts them together because it's kind of confusing. It does not additionally address the overt act, but it does address the elements of conspiracy. I just didn't want to gloss over that [147] as we go through this.

THE COURT: This instruction is normally given. It's appropriate. Then we break them down.

The next instruction will be existence of agreement, which will be Instruction Number 40.

Forty-one is appropriate because—

MR. WALLNER: Yes, Your Honor.

THE COURT:—it has to do with the codefendant, Couther.

Then the next one, members of the conspiracy, it's a lengthy instruction. That will need to be given. Do you agree, Mr. Wallner?

MR. WALLNER: I so agree, Your Honor.

THE COURT: Mr. Bourgeois, do you want this rather lengthy instruction?

MR. BOURGEOIS: Yes, sir. Your Honor, I just want to be clear, we are talking about Count 1, membership in the conspiracy?

THE COURT: Yes.

MR. BOURGEOIS: That is Number 42 now.

THE COURT: Yes, that's Number 42, and that will be given.

MR. BOURGEOIS: Thank you.

THE COURT: Then the next one will be 43, commission of an act in furtherance of the conspiracy.

[148] MR. BOURGEOIS: No objection.

MR. WALLNER: No objection, Your Honor.

THE COURT: You went a drug quantity instruction, Mr. Wallner?

MR. WALLNER: Yes, Your Honor.

THE COURT: Okay. That will be given, Number 44.

MR. BOURGEOIS: Your Honor, I believe—and this may be premature, but we need to discuss it, also, in terms of the verdict sheet, but it's the government's burden to prove not merely quantity, but the actual substance. I think it's highly unlikely the jury, if they get that far, is not—

THE COURT: Why don't you all propose a verdict sheet. I would like to see a very tight verdict sheet that you all agree upon. I will be glad to look at it.

MR. WALLNER: We have actually submitted them.

THE COURT: I haven't looked yet. Let me see. I'm sorry. We will get to that then. Let's deal with instructions. Instruction Number 44, amount of controlled substance, that's an appropriate instruction.

Then Count II, elements of the offense, no objection, that will be 45. Any objection by the government?

MR. WALLNER: No, Your Honor.

THE COURT: The defense?

MR. BOURGEOIS: Nope. No objection.

THE COURT: All right. Then 46 will be Count II, [149] definition of distribution. Any objection by the government?

MR. WALLNER: No, Your Honor.

THE COURT: The defense?

MR. BOURGEOIS: No, Your Honor.

THE COURT: Then definition of possession will become 47. Any objection by the government?

MR. WALLNER: No, Your Honor.

THE COURT: Defense?

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. Then the next instruction will be 48, possession of narcotics. Any objection by the government?

MR. WALLNER: No objection.

THE COURT: Defense?

MR. BOURGEOIS: No objection.

THE COURT: The next one will be knowledge of drugs or narcotics.

MR. BOURGEOIS: No objection from the defense.

MR. WALLNER: No objection, Your Honor.

THE COURT: Is the next instruction necessary, Count II, method of proving knowledge? Mr. Wallner?

MR. WALLNER: I think it will largely be covered by involvement in the conspiracy, although this—

THE COURT: I just think this is a little bit surplusage. We don't have a situation here where there's some [150] confusion over—I don't see how this is really applicable. Does the government want this instruction?

MR. WALLNER: No.

THE COURT: Defense?

MR. BOURGEOIS: I think I would like the first two paragraphs. I think that, for example, in there—

THE COURT: All right. We will do the first two paragraphs. That will be Instruction Number 50.

MR. WALLNER: I think, Your Honor, as we get to the next one, there can be a combined instruction as to quantity.

I just need you to indicate to the jury that they need to make that decision as to both Count I and Count II. I put these instructions in here for completeness sake, but I don't think—

THE COURT: What was the first quantity instruction? That was Instruction Number 44.

MR. WALLNER: Correct, Your Honor. I don't think you necessarily have to reread the same instruction obviously, but I think there has to be some indication that the amount of drug decision has to be made both—

THE COURT: I will just incorporate portions of this instruction in Number 44, it seems to me. We can refer to Count I, conspiracy, Count II, narcotics charged, and I think there is a way you can blend both of them. Are you with me on that?

[151] LAW CLERK: Yes.

THE COURT: At Number 44?

LAW CLERK: Okay.

THE COURT: So, we won't give an additional instruction on quantity as to Count II.

Now we are up to Page 80 of these proposed instructions, aiding and abetting. Mr. Wallner, do you want that instruction?

MR. WALLNER: Yes.

THE COURT: That will be given. That is Instruction Number 51, I believe. Is that correct?

MR. BOURGEOIS: Forty-nine.

THE COURT: We have proving knowledge as 50. 51. That will be given.

Fifty-two has to be given in terms of aiding and abetting, the elements.

MR. WALLNER: Correct.

THE COURT: Now, I vary on this. In terms of submitting the Indictment, do you want the Indictment to go in to the jury, Mr. Wallner?

MR. WALLNER: I would like it to, Your Honor.

THE COURT: Mr. Bourgeois?

MR. BOURGEOIS: I object.

THE COURT: Let me hear from you on that.

MR. BOURGEOIS: Well, as the instructions say over [152] and over, the Indictment itself is not evidence, and the evidence comes through the testimony and other exhibits. I fear that something sitting in the jury room bearing the insignia of the Court and the caption of this case, the language of the United States government, it strikes me as it would be unfairly prejudicial, especially since it has no evidentiary value whatsoever.

THE COURT: I think I have repeatedly submitted the Indictment. The only reason I am hesitating is because there is a codefendant in this case.

MR. BOURGEOIS: Well, Your Honor, I would urge you to routinely change that practice.

THE COURT: Hold on.

(Pause in the proceeding.)

THE COURT: All right. I will let you know on that in terms of—I will tag that. I will let you all know tomorrow morning if I am going to submit the Indictment to the jury.

I think a punishment instruction is necessary in this case. Mr. Wallner, any objection by the government?

MR. WALLNER: No objection, Your Honor.

THE COURT: The defense?

MR. BOURGEOIS: Yes.

THE COURT: All right. The objection is so noted, but the punishment instruction will be given. It will either [153] be 53 or 54. Your exception is noted.

MR. BOURGEOIS: Thank you.

THE COURT: Then the last instruction, Number 55 or 54, you need to consult and the need for unanimity. Then the last one will be Number 55 or 56.

What I did normally is unless—I don't see any other jurors who had any jury experience, so I routinely either pick Juror Number 1, I pick Juror Number 8 sometimes, but I just routinely pick Juror Number 1. I definitely don't have an election that goes on in the jury room. I pick a foreperson. Any objection from the government on that?

MR. WALLNER: No, Your Honor.

THE COURT: The defense?

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. Juror Number 1 will be the foreperson. That does it for reviewing through. We will get those finalized and to you tomorrow morning.

MR. BOURGEOIS: Your Honor—

THE COURT: In terms when we start, I think probably we should try to get started around 9:15, maybe not right at 9:00, and that should allow us enough time to do some housekeeping and be ready to potentially have both sides rest and be ready to go to the jury at 10:00 tomorrow.

Yes, Mr. Bourgeois.

MR. BOURGEOIS: Your Honor, I would request an [154] instruction to the effect that you have heard evidence, that the government possessed evidence that it has lost, and the government had sole care, custody and control of that evidence and you may infer, you are not required to infer, but you may infer that the evidence contained on that missing evidence would be damaging to the government's case. I have not been able to locate an instruction in Sand's, which seems to be all the substantive offenses. I did some quick research, but not exhaustive as such.

An instruction is appropriate under Indiana law, and unfortunately I run into exfoliation principally in two contexts. One is civil cases where we all know instructions on that, and where the issue has arisen in federal criminal cases principally it is whether the Indictment should be thrown out, the government punished in some substantive way. You have to establish bad faith for that and obviously nobody is arguing that. But I do believe that it would be appropriate to have an instruction that says, well, the government had sole possession of some evidence, and it is not evidence that I had equal access to, but

the government was negligent or otherwise lost or destroyed it. You may infer that that evidence could contain information that would not be helpful, in fact

THE COURT: Do you have the authority for that, Mr. Bourgeois?

[155] MR. BOURGEOIS: I can cite you the Indiana stuff tomorrow morning.

THE COURT: The Indiana State cases?

MR. BOURGEOIS: Yes, sir.

THE COURT: Well, I certainly have great respect for all the State Courts across the country, and I am sure that the Indiana State Courts may have a reason for that, but I don't know of having that instruction given in my experience in this courthouse, nor do I know of any federal authority for that.

You certainly can come up with a proposed instruction to preserve your record, and I will say now I am not inclined to instruct the jury that they can infer (unintelligible) the government because there is nothing that I have seen in this case that would justify that kind of inference one way or the other. It's just that the tape recording was lost and the case agent has acknowledged it. To go further and say there should be an inference drawn, I don't see any case law in the Fourth Circuit or this District—you certainly can submit a proposed instruction, cite your Indiana cases, and I will be glad to consider it tomorrow morning.

MR. BOURGEOIS: I appreciate that, Your Honor.

THE COURT: Certainly. Anything further from the government?

MR. WALLNER: Just the verdict form information, [156] Your Honor. I have—

MR. BOURGEOIS: I have these as well.

MR. WALLNER:—both copies. I seem to agree with—I think Mr. Bourgeois and I both agree as to the verdict form. I think the issue is going to be the special verdict form that comes along with amount of drugs.

THE COURT: Well, the matter of aiding and abetting, I guess the special verdict form—what is the disagreement there on the special verdict form?

MR. WALLNER: Mr. Bourgeois has his parsed out such that the jury is supposed to fill out not only the type of drug, but then a specific volume of narcotics. I actually, and I think this is probably incorrect, but I put in here the amount of cocaine base. The government is assuming the fact that they wouldn't even read this special verdict form unless they had already determined the defendant was guilty of possession with intent or conspiracy to distribute cocaine base. And then I parsed the special verdict form in terms of the guideline situation.

THE COURT: Mr. Bourgeois, in terms of what controlled substance you find was involved in the conspiracy, there is just no dispute about that. Either you would find that there was cocaine base, crack cocaine, or there's not. There is no confusion over it.

You certainly can address the matter of percentage [157] in, if I understand where you're going, in terms of—I gather you are going to address the matter of it being 41 percent of a figure. You are going to make that argument to jury I gather, but in terms of—there isn't an issue about what controlled substance was

involved in the conspiracy. It is strictly the matter of the quantity, and it seems to me confusing. It's not like we have a situation here where we are having powder cocaine versus crack cocaine. I don't think that is an issue here. I will be glad to hear from you.

MR. BOURGEOIS: Well, Your Honor, I simply put this out there because it is, of course, the government's burden is not only to establish quantity, but the actual drugs involved.

THE COURT: Doesn't the jury reach that? I mean, they would reach, that.

MR. BOURGEOIS: Well, if that's true, there's no evidence of any other controlled substance—

THE COURT: So, if they don't find it's crack cocaine, they will find him not guilty.

MR. BOURGEOIS: This is true.

THE COURT: So, I am inclined to give the government's special verdict form but, again, you can readdress that again tomorrow if you want.

MR. BOURGEOIS: Your Honor, I think the dispute we had, and I think Mr. Wallner is slightly mistaken, I had put in the general verdict form a controlled substance. He put [158] cocaine base. I understand that you believe it should say cocaine base. That's fine. With regard to the special verdict form, I do have an objection to listing three different quantities here. I understand that that is in accordance with the Sentencing Guidelines, but this gentleman was not charged with possession of anything other than 50 or more grams, and I think at this stage what we ought to put is not a suggestive number in there because it suggests one, two or three. I think it should put what is the quantity the government proved, because

otherwise, you are suggesting an answer to it, and an answer that only relates to sentencing issues as opposed to what the government's burden is. It's the government's burden to establish to this jury, for the jury to find—

THE COURT: On these percentages, in terms of the amount, they can clearly come up with a figure and say, well, we are not sure of the exact figure, but it's less than 50 grams or it's more than 50 grams obviously. That's the only thing that has any legal significance, correct.

MR. BOURGEOIS: I think what has legal significance is the figure that they find the government has proved. The subsidiary significance of whatever that figure is plays into sentencing.

THE COURT: But there is no legal significance to their exact percentage, whether they determine it's 31.3 grams [159] or 37 grams.

MR. BOURGEOIS: I think there is a legal significance.

THE COURT: Well, there's a significance, I don't have the table in front of me, but there's categories.

MR. WALLNER: Frankly, Your Honor, that's—

THE COURT: These are the only categories.

MR. WALLNER: Those are the categories.

THE COURT: Whether it's more than 50 or less than 50 and then less than 5. There's not a category of less than 30 or less than 40; is there, Mr. Wallner?

MR. WALLNER: No, Your Honor.

MR. BOURGEOIS: No. It says more than 50, less than 50 but more than 5, and less than 5. I simply

believe that the most appropriate special verdict question should be if you find this gentleman guilty, what quantity do you find the government has proved beyond a reasonable doubt of that substance was.

THE COURT: All right. Your exception is noted, but I think this is an appropriate special verdict form in terms of in light of the Sentencing Guidelines and to be clear on this. So, your exception is noted.

Anything further from the point of view of the government?

MR. WALLNER: The only issue was, Your Honor, you [160] began to say something and we kind of cut you off about the aiding and abetting instruction as it relates to the verdict form. That's the only thing.

THE COURT: No. I realized that we need to give it because he is charged in Count II with aiding and abetting. MR. WALLNER: Yes, Your Honor.

THE COURT: It's very lengthy, but I have to give it.

MR. WALLNER: I'm sorry, Your Honor, as to the verdict form itself, there actually is a not guilty/guilty on the verdict form as to aiding and abetting in Count II.

THE COURT: Well, because technically they could find that he aided and abetted Mr. Couther on Count II, and so that is appropriate on the form.

Anything further from the point of view of the government?

MR. WALLNER: No, Your Honor. Thank you.

THE COURT: The defense?

MR. BOURGEOIS: No, Your Honor.

THE COURT: Okay. Well, thank you for your promptness in zeroing in on this case. I think what we will do is I think we don't need to get started at 9:00. It seems to me, we don't need more than half an hour to address any loose ends, advise Mr. Wright of his rights. Does counsel agree? I think if we are ready to go at 9:30 here, then the [161] jury can clearly be in their chairs and ready to go with closing argument at 10:00? Do you agree, Mr. Wallner?

MR. WALLNER: I believe so, Your Honor. I will know certainly by then whether or not I will be able to obtain the additional witnesses that I—

THE COURT: Right. Mr. Bourgeois, is it alright with you?

MR. BOURGEOIS: It is.

THE COURT: All right. We will just see you here in court at 9:30 tomorrow promptly. I will be on the bench and ready to go at 9:30, and we will go from there. Goodnight.

COUNSEL: Thank you, Your Honor.

(The proceeding was then concluded.)

The foregoing is an accurate transcript from the record of the proceedings produced from the court reporter present at the hearing.

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[221] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Criminal No. RDB-05-078

UNITED STATES OF AMERICA,

v.

JAMES WRIGHT,

Defendant.

Baltimore, Maryland
September 14, 2005
9:30 a.m.

TRANSCRIPT OF TRIAL BEFORE THE
HONORABLE RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by notereading.

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[223] PROCEEDINGS

THE COURT: You have the revised jury instructions I think. Is that correct, counsel?

MR. WALLNER: Yes, Your Honor.

THE COURT: All right. We'll go over those in a minute. Let me just address a few matters if I can first thing this morning. First of all, before we bring the jury back, the Government has rested. Is that correct? And will rest this morning, Mr. Wallner?

MR. WALLNER: Yes, Your Honor. The only issue will be the introduction of two pieces of evidence. They were mentioned. I know this Court follows the local rule. I would assume they're in, but I will move them in formally—

THE COURT: Under Rule 106.7, they would be in if they have been referenced. But what exhibits are they?

MR. WALLNER: They're Exhibit Number 2, which is obviously the videotape—

THE COURT: Right.

MR. WALLNER: —and Exhibit 5A, which would be the DEA-7 which is the chain of custody—

THE COURT: So the Government will introduce Government Exhibit 2 and 5A and then will rest.

MR. WALLNER: Yes, Your Honor.

THE COURT: All right. And actually, under Local Rule 106.7, they're in anyway. But we'll clarify that. All right. [224] And then the Government will rest. And from the point of the defense, is the defendant going to testify, Mr. Bourgeois?

MR. BOURGEOIS: I need to consult with my client very briefly.

THE COURT: All right. You want to do that now?

MR. BOURGEOIS: May I?

THE COURT: Certainly. Go right ahead. (Counsel referred with his client.)

MR. BOURGEOIS: Your Honor, Mr. Wright elects not to testify in this case. I've apprised him of his right to do so and also his right not to do so and if he elects to stand on his right not to testify, that you will instruct the jury that they cannot hold that against him and in fact, he does have his constitutional right not to testify and thus nothing can be inferred from that adversely.

THE COURT: And you've explained to him that there's a jury instruction that I'll mention to him in a minute that my clerk will find out what number that is and alert me to it in terms of the fact that there's no requirement upon him to testify and an inference can't be drawn against him and we'll go over that. Mr. Bourgeois, why don't we address—do you want to make any motions now just for the record with respect to the—we can I think deal with that now out of the presence of the jury. The Government will just introduce the two exhibits and will rest.

MR. BOURGEOIS: Yes, Your Honor.

[225] THE COURT: So it seems to me that we can just address that now in terms of a Rule 29 motion that you probably want to make for the record I presume?

MR. BOURGEOIS: Yes, Your Honor. I do move or I will move—

THE COURT: Why don't we just—I think we can take this out of order. There's no reason why we can't. Exhibits 2 and 5A will be deemed to be introduced already under Rule 106.7. But the Government will do that formally in front of the jury. But the Government has now essentially rested. So I will hear from you on a Rule 29 motion.

MR. BOURGEOIS: Yes, Your Honor. The only reason I say something is just to be absolutely clear under the rules that I have to make the motion at the close of all evidence and when the Government has rested and so I will renew the motion simply by standing up and saying I renew my Rule 29 motion and sit down and we'll understand—

THE COURT: Why don't you—you can just come up to the bench after Mr. Wallner introduces the two exhibits in the presence of the jury and you can just note for the record you're reviewing your motion. And why don't you address it now?

MR. BOURGEOIS: Okay. Thank you, Your Honor. I do move at this time and will so move in a few moments for a judgment of acquittal in this case. I think it's been clear from the evidence and the way it's come in that what we have here is[226] as close to a denial of due process in the way that law enforcement has gone about its investigation and the evidence in this case. We have a law officer, Sergeant Smith, who I respectfully submit committed perjury on the stand here. He told this jury that he provided Mr. Couther with 10 and 20-dollar bills—I'm sorry—Mr. Saffell with $10 and $20 bills that comprise $2,000 in buy money. Detective Crawley demonstrated in fact that it was $50 bills and we have introduced into evidence the serial, you know, the log of what was provided. I think Sergeant Smith testi-

fied that way to fudge the fact frankly that Mr. Saffell had stolen government moneys to buy himself cigarettes and drinks. Sergeant Smith also tried to obfuscate before the jury what was going on when he learned about Mr. Saffell's involvement in the MDMA lab and in fact, Mr. Saffell clarified that for the jury, that Sergeant Smith first learned of that as to law enforcement after his arrest in January 2004. The other evidence as we pointed out throughout the course of this trial grossly lacking and was mishandled, were missing, the audiotape of the setup call where we have mishandling of the videotape taken from the car, which was not marked in the normal course of action that police officers are supposed to. At the time it was collected, it was not marked with a case number, with the collecting officer's initials, the date of recovery. It was stored initially in Detective Crawley's case file. Then moved to a safe where it sat for one to five days where it was freely[227] accessible by other law enforcement officers and it was not reviewed by Detective Crawley for some time after it was collected. So I think there are serious questions about the authenticity of the case. I understand Detective Crawley's testimony sufficient for authentication purposes. But I think when we add to that the misdating or alleged misdating of this tape by 11 years and 13 hours, I would submit, Your Honor, that evidence more likely than not was collected in 1993. We can go on. I think we have serious questions that are on that videotape. There is no passing of money that is seen. There is no passing of drugs that is seen and it goes on and on.

THE COURT: Did you just say that it's more likely than not that the tape was 11 years old?

MR. BOURGEOIS: I think that's a reasonable inference we can draw, that that is the date on the tape. We have testimony that is contrary to that. I understand that, Your Honor. What I'm arguing is that when we aggregate all of the facts and all of the problems with this evidence, we have a denial of due process. So that is the first basis for the motion for acquittal. The second basis is the defense of entrapment. Mr. Wright, if it was him on that tape, we have it crystal clear from the law enforcement officials and from Mr. Saffell that this was a set-up job. This was a crime that was conceived in the minds of law enforcement that was thrust upon Mr. Wright and there's no evidence of any predisposition and in fact if we [228] listen to the tape, we hear Mr. Wright on numerous occasions basically playing along, but then saying no. We have him saying, getting very uncomfortable with Mr. Saffell's conduct, expressing that he wants to get out of this car. So if there was a crime, I would submit, Your Honor, the defense of entrapment would justify a judgment of acquittal. Thirdly, we have a fundamental problem with the evidence in that we have significant gaps of time where Mr. Saffell is out of the car. We know he's using money that the Government provided him and I would suggest that the strongest inference that can be drawn from this tape is that Mr. Saffell himself purchased the drugs while either at the Baba Johnny's shop where he was not observed by law enforcement or at the Prima Food shop where he was not observed by law enforcement. Finally, we have the admission of Detective Crawley that Mr. Saffell could have smuggled money into that car and that he could have smuggled drugs into that car and that's significant because if that's what happened, we have by Mr. Saffell's own admission a man who is motivated even

though he believes he's going to get a ten-year sentence. But if he does and spins as hard as he can to help make government cases, that that will be taken into account. So we gather all that up. We have Mr. Saffell's testimony that he said it was 20's that the Government gave him when in fact it was not. It was 50's as we've discussed. So all three bases, Your Honor, I think that the complete, you know, the way this case was generated and the problems with the evidence would constitute I [229] submit, Your Honor—excuse me. My client is talking to me.

(Counsel conferred with his client.)

MR. BOURGEOIS: Yes. Mr. Wright asked me to point out for Your Honor that Mr. Saffell first testified that he gave the money to Mr. Couther and then he testified later in his testimony that he gave the money to Mr. Wright. He confirmed that he gave the money to Mr. Wright and Detective Crawley indicated from the stand that in fact according to Mr. Couther at the time of the arrest, Mr. Couther stated—Mr. Saffell at the time of Mr. Saffell's arrest that Mr. Saffell gave the money to Mr. Couther. Your Honor, all of these facts and circumstances I suggest justify a judgment of acquittal at this time based upon, A, the defense of entrapment, B, the perjury of law enforcement personnel, specifically Sergeant Smith and, C, all of the facts and circumstances suggest that it would be a denial of due process for you to allow this case to go to a jury.

THE COURT: All right. Mr. Bourgeois, first of all, with respect to the standard here, obviously, the standard is well stated by the Fourth Circuit is if viewing the evidence in the light most favorable to the Government any rational trier of facts could have found the defendant guilty beyond a reasonable

doubt, then the Rule 29 motion should be denied as stated by the Fourth Circuit in *United States v. Tresvant* at 677 F.2nd 1018, a Fourth Circuit opinion 1982 or reiterated in the Roamer opinion by the Fourth Circuit in 1998 at 148 F.3rd 359. Also the [230] standard is the Government is allowed the benefit of all reasonable inferences from the facts proven to those thought to be established. Again the Tresvant case. Indeed the Fourth Circuit in United States v. Wilson has held that the uncorroborated testimony of a single witness even when that witness is an accomplished co-defendant or informant is enough evidence to deny a Rule 29 motion and that was set forth by the Fourth Circuit in *United States v. Wilson* at 115 F.3rd 1185. So just the testimony alone of Jeffrey Saffell would be sufficient. When you combine that with the observations of Special Agent Flickinger, Sergeant Smith, Special Agent Wilson, clearly under that standard, the Rule 29 motion should be denied on the matter of denial of due process and on the matter of the sufficiency of the evidence.

I'm a little troubled by your argument here on the defense of entrapment because entrapment is an affirmative defense that places on the defendant the initial burden of presenting evidence that the Government induced him to commit the charged offense as has been noted by the Fourth Circuit in the Sligh case, 1998 case, 142 Fed.3rd 761. And the Fourth Circuit has held recently in *United States v. Hsu*, last year, 2004, 364 F.3rd 192, that evidence that the government agents provided only the opportunity to commit the crime and that the defendant availed himself of that opportunity does not demonstrate inducement. There is some burden upon the defendant of showing [231] government inducement and if the defendant meets that initial burden of showing

government inducement, the burden will shift to the Government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. Again, the Sligh case at 142 F.3rd, a Fourth Circuit opinion. There is no entrapment instruction that you've requested and nor is there entrapment instruction—there's no entrapment instruction to be given to the jury nor has there been any evidence presented by the defendant as to entrapment.

MR. BOURGEOIS: Well, Your Honor, I would respectfully submit that through the cross-examination of a number of law enforcement officers including Mr. Saffell that we did present a prima facie case of inducement particularly—

THE COURT: How so?

MR. BOURGEOIS: How so? By not merely presenting the opportunity, but actively going out there, allegedly setting up this deal, providing the money, encouraging—you know, this was not merely a passive opportunity. There was active encouragement on the part of—

THE COURT: Well, how is there any evidence of inducement? This is no more than any routine controlled buy monitored by law enforcement officials in which an individual meets up with someone else and goes to sell drugs. Clearly, you know, if this is inducement, then every case involving a controlled buy is an inducement which requires the Government to [232] show lack of predisposition on the part of the defendant. You have presented absolutely no evidence, there is literally no evidence in this record of any kind that you've presented with respect to showing government inducement. This is nothing more than having Mr. Saffell contact a person that

he's testified is a person from whom he has purchased drugs and setting up a drug transaction and you're going to have to highlight for me because if the evidence in this case is sufficient to carry the burden of showing government inducement, I'm hard pressed to find of any case in which we wouldn't face entrapment. You just can't stand up and argue entrapment without presenting evidence. You haven't requested an instruction. We've gone over the instructions. You haven't requested an instruction and in that case, not only is your argument on the Rule 29 motion inappropriate on the entrapment, but I'm going to instruct you that you cannot argue that to the jury. You just can't stand up and argue entrapment to the jury when there's no evidence as to it nor when you have not and you have not requested an entrapment instruction. And with respect to your client's entitlement to an entrapment instruction, a defendant will be entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment. The Matthews case, 485 U.S. at 62 and the Fourth Circuit in the Sligh case which I've mentioned several times addresses that and it can be error for a Court to decline to give an entrapment instruction where once a [233] defendant presents sufficient evidence of government inducement. But where is the government inducement other than Saffell saying I want to go buy drugs?

MR. BOURGEOIS: Well, Your Honor, I will respond this way. I believe there's evidence from Mr. Saffell and from the law enforcement authorities. We have not requested an instruction. I make the argument for the record. We respectfully disagree and I understand—

THE COURT: Well, it's not a matter we disagree. You can't argue entrapment to the jury.

MR. BOURGEOIS: I don't intend to, Your Honor.

THE COURT: All right. Okay. That's fine then. Then based upon the Rule 29 motion, the standard is such, clearly, the cases I've cited that in viewing the evidence in the light most favorable to the government any rational trier of fact could find the defendant guilty beyond a reasonable doubt. So clearly the Rule 29 motion will be denied and you don't intend to put on any other evidence. Correct?

MR. BOURGEOIS: That's correct, Your Honor.

THE COURT: All right. Then I'll advise the defendant of his right not to testify in a minute. We'll go over that. But I want to make sure we're clear on the matter of closing argument. If you feel that you're entitled to it, you can't make an argument to the jury in an area where we're not even going to instruct the jury as a matter of law. So if you're not [234] requesting an entrapment instruction, you can't get up and argue entrapment. I guess you understand that.

MR. BOURGEOIS: We're crystal clear on that.

THE COURT: All right. Okay. That's fine. Now with respect to the matter of the entrapment instruction, as you raise this argument, I was reading some of the cases or the notes as to some of the cases on this. I just don't find that, you haven't asked for an entrapment instruction nor would you be entitled to one.

All right. Mr. Wright, if you'll stand, please, sir? I want to make sure, sir, that you understand that you have the right to testify in this case—what instruction number is this, Ezra?

THE CLERK: Number 10.

THE COURT: Number 10. You have the right to testify in the case and you'd be subject to cross-examination by the Government. But you also have the right not to testify, a constitutional right not to testify and your attorney, Mr. Bourgeois, has requested an instruction and I'm going to give an instruction to the jury as follows. The defendant did not testify in this case. Under our Constitution, he has no obligation to testify or to present any other evidence because it is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the prosecution throughout the entire trial and never shifts to the defendant. [235] The defendant is never required to prove that he is innocent. You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. You may not consider this against the defendant in anyway in your deliberations in the jury room. Mr. Wright, do you understand that I'm going to instruct the jury in that regard?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now with respect to the jury being so instructed, I want to make sure you understand that, you understand that you would have the right to testify. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you would also have the right to compel the presence of witnesses in this case and to call witnesses and just as the Government has subpoena power to call witnesses, do you understand that you could have requested of Mr. Bourgeois that he request subpoe-

nas from the clerk to require people to come in and testify on your behalf?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Mr. Bourgeois, are you privately retained or court appointed?

MR. BOURGEOIS: Court appointed, Your Honor.

THE COURT: All right. I want to thank you for your service thus far in the case. You've done an excellent job for [236] your client.

I want to make sure you understand, Mr. Wright, that the Criminal Justice Act allows that in the event that an individual cannot be represented by our Public Defender's Office, which is an excellent office here of the court, that there is a select group of Criminal Justice Act panel attorneys who are deemed qualified by this court to represent indigent defendants. Mr. Bourgeois is one of those attorneys. It's not just anyone that is just picked from the lawyers here in Baltimore and the State of Maryland to represent defendants in this court. There's a select group of lawyers whose qualifications are reviewed and whose performance is reviewed each time. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And the point I want to emphasize to you is is that Mr. Bourgeois is among that select group of lawyers who have been deemed qualified to represent criminal defendants in federal court. Is there anything that you've asked him to do which he's not done?

THE DEFENDANT: I can't say that he didn't do it. But I mean I did request for a witness at Prima Food.

THE COURT: All right. A witness at Prima Food?

THE DEFENDANT: Yes, sir.

THE COURT: All right. What information were you desiring to get from this witness from Prima Food?

[237] THE DEFENDANT: Just to say I was there at the time and I did go on a job interview.

THE COURT: All right. Well, I don't think that's really been disputed. It's been brought out.

THE DEFENDANT: I wanted to get it on the record. I did request—

THE COURT: All right. I understand. And Mr. Bourgeois, I think the record is clear, established that. He questioned Mr. Saffell and Mr. Saffell said that you went on a job interview at Prima Food and that's clearly been established. So I think Mr. Bourgeois has certainly brought that fact out. Is there anything else that you were concerned about making sure that was established?

THE DEFENDANT: No, sir.

THE COURT: All right.

MR. BOURGEOIS: Your Honor, may I just say—

THE COURT: Certainly, Mr. Bourgeois.

MR. BOURGEOIS: For the record and I just want to reassure Mr. Wright. I went to Prima Foods and went to get the records of his application and unfortunately, that establishment destroys its records after six months of applications. It did not have an independent recollection. But we did make that effort.

THE COURT: All right. And, Mr. Wright, the record is clear that you did go on a job interview and, Mr. Bourgeois, as [238] far as I can recall from the

evidence, has certainly been able to establish that and will be permitted to argue that to the jury. Have you had an opportunity to talk with him about the evidence in the case and has he asked questions of the witnesses as you wanted him to do?

THE DEFENDANT: Yes. But some of the witnesses I would have wished he would have went a little more in-depth about some of the questions.

THE COURT: All right. Such as?

THE DEFENDANT: Jeffrey Saffell, Sergeant Thomas Smith. I forgot the one police officer name. The one that searched me. He said he never searched me though. Flickinger. I wanted to know the procedures. Like he said if he arrested me, he should have searched me, you know what I mean. I would think that makes sense.

THE COURT: Well, Mr. Bourgeois did inquire in terms of the search of—

THE DEFENDANT: I mean in-depth. He didn't, the in-depthness of it, I would have liked to him, you know, went a little further with it.

THE COURT: Well, I want to make sure we're clear. Exactly how much farther could you have gone? A lawyer, when a lawyer asks a question of a witness and the witness gives a response, a lawyer's cross-examination doesn't amount to argument with the witness. He did inquire of the witness—

[239] THE DEFENDANT: He said he arrested me. But he said he didn't search me. I would just would like him to ask him, well, what's the procedure when you arrest somebody. Isn't a procedure that you search them before you, you know, put them in the back of your police car?

THE COURT: I believe that that record reflected that essentially was the question that was postured. I don't know that there's any prejudice to you in that regard. Is there anything else that you think should have been explored?

THE DEFENDANT: Yeah. When Crawley, Detective Crawley was on the stand, he testified that it was $50 bills, that he searched the C.I. and gave him the money and the scale and when Sergeant Thomas Smith was on the stand, he said it was 20's and 10's and he searched the C.I. So I mean—

THE COURT: Well, that's clearly been brought out. Mr. Bourgeois has established—

THE DEFENDANT: I would like him to go further with Crawley than asking him—he never asked Crawley in front of the jury did Sergeant Thomas, did you hear Sergeant Thomas Smith just testify in front of the jurors that he was the one that searched him and it was no scale in the trunk and he gave him 10's and 20's and Jeffrey was spending money. I mean just so the jury can hear it because sometimes if they don't hear it, they might not remember and they go back there—

THE COURT: Well, that has been established on the [240] record, Mr. Wright. Mr. Bourgeois has established that one witness has said as to 20's, denominations of 20's, another government witness has said denominations of 50's. That's clearly in the record and Mr. Bourgeois is going to argue that to the jury this morning. So I don't know where—

THE DEFENDANT: I mean it's in the record. He argued that Saffell said it. He never said that the police officer which is a law official, that he said it. I mean it makes, to me it make a difference. Whether

the informant with the criminal record said it or, you know, in their eyesight, they look at a law enforcement officer to tell the truth. You know what I mean? I wanted him to put that in their head that he just got up there and perjured himself. I mean he basically said Jeffrey said it was 20's and 10's. He never really went into detail and got him to admit that it was Sergeant Thomas Smith also that admitted that he searched him and it was 20's and 10's.

THE COURT: Mr. Wright, I'm looking at my notes here in terms of review of the record. That's clearly in the record. Mr. Bourgeois clearly had the police officer—

THE DEFENDANT: He asked—

THE COURT:—Mr. Smith—just hold on one second. He clearly has had Sergeant Smith of the Baltimore Police Department testify as to denominations of 20. Correct, Mr. Bourgeois?

MR. BOURGEOIS: Correct, Your Honor.

[241] THE COURT: And Detective Crawley testified as to denominations of 50. Correct, Mr. Bourgeois?

MR. BOURGEOIS: Correct, Your Honor.

THE COURT: So we have two different police officers testifying as to two different denominations. Mr. Bourgeois has established that and the time to now emphasize that is this morning. He will argue to the jury as to that variance. He has established exactly what you are suggesting you wanted to be established.

THE DEFENDANT: I mean one was in the beginning of the morning, one was in the afternoon of the morning. I just wanted him to put it out there in front of the jury at that time while the officer was on --

THE COURT: Sir, the time to put it out there in front of the jury is this morning in closing argument.

THE DEFENDANT: Oh, okay. I didn't know.

THE COURT: That's what you do. You don't run over to the jury and argue in the middle of a witness testifying. That might be on T.V. That's not what you do in a courtroom. The lawyer establishes facts and argues to the jury. He is going to do that this morning. He is going to note that variance. So I don't see there's been any prejudice to you in that regard. He's done exactly what you wanted him to do on that issue. What other concerns do you have?

THE DEFENDANT: I just want to make sure I got on [242] record because just in case if I was to happen to go to prison, I don't want to look back years later—

THE COURT: Mr. Bourgeois is going to be free to argue that and he's going to argue that and the record reflects that Smith testified as to denominations of 20 quite clearly and that Crawley testified as to denominations of 50. So it's in the record. It's been established by your lawyer and your lawyer is going to argue that. So is there anything else on that point, Mr. Wright?

THE DEFENDANT: No, sir.

THE COURT: All right. Anything else that you want to make sure was established?

THE DEFENDANT: No, sir.

THE COURT: All right. And you understand that you have the right to testify and you have the right not to testify and I'm going to instruct the jury in Instruction Number 10 as I've indicated of your right not to testify. And you've had an opportunity to discuss that with Mr. Bourgeois?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And do you understand that obviously if you did testify then you would be subject to cross-examination by the prosecutor, by Mr. Wallner? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you've had an opportunity to discuss [243] all those matters with Mr. Bourgeois?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Apart from any other issues you've raised, is there any other issue? Are you satisfied with his representation of you here at the trial this week?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Then I'll find that it's a knowing and intelligent waiver with respect to not exercising his right to testify and in fact exercising his right not to testify. Anything further from the point of view of the Government on that, Mr. Wallner?

MR. WALLNER: Your Honor, I'm just curious. In terms of scheduling, are we going to proceed directly to closing argument after we go through this process?

THE COURT: Yes. Yes.

MR. WALLNER: Then I just need a few moments—

THE COURT: We'll give you a few moments in a minute to do that. Sure, Mr. Wallner. And as I think you're aware, Mr. Bourgeois, I think I've indicated before, I charge the jury after closing argument by counsel.

MR. BOURGEOIS: Correct, Your Honor.

THE COURT: All right. Anything further from the point of view of the Government on any matters before we bring the jury in?

MR. WALLNER: No, Your Honor. I believe Mr. Bourgeois [244] submitted two instructions that he wanted the Court to look at.

THE COURT: All right. I'll take a look at those.

MR. BOURGEOIS: I provided a copy each, of each of these to Mr. Wallner. May I hand them to you or to your clerk, Your Honor?

THE COURT: Yeah. Do you have an extra copy? Bring them up here to the bench if you want me to take a look at them.

MR. BOURGEOIS: Thank you.

THE COURT: Thank you, Mr. Bourgeois.

MR. BOURGEOIS: First, Your Honor, is Defendant's Proposed Jury Instruction on Mr. Saffell's Prior Misconduct, we discussed this yesterday and you indicated you were inclined to see if we could alter Sand 7-18 regarding prior perjury to take into account Mr. Saffell's admissions and so I've tried to do that and I would request that this instruction be given as modified by me.

THE COURT: All right. What's the position of the Government on that?

MR. WALLNER: Well, Your Honor, I'll object to that. I'm not quite—I'm not exactly sure and if I look at Sand and Seifurt 7-18 to see the differences—

THE COURT: Looking at the Court's Instruction Number 36, which is now marked as 36, Sand and Seifurt Form Instruction 7-18, it's been modified. Sand and Seifurt reads there has been evidence that

a witness who testified at this trial lied under [245] oath at another proceeding. That would not be applicable here there is no such evidence. But Mr. Bourgeois has modified that to read there has been evidence in this case that a witness who testified at this trial violated his agreements with the Government by engaging in criminal conduct after he agreed that he would not do so. That clearly has been the evidence and then what Mr. Bourgeois has done is just to then incorporate the rest of 7-18. "I must warn you that the testimony of this witness should be viewed cautiously and weighed with great care. It is however for you to decide how much of his testimony if any you wish to believe," which is the appropriate modification of Sand and Seifurt 7-18 on the facts of this case.

MR. WALLNER: But, Your Honor, that doesn't establish a prior perjury and what I'm suggesting to the Court is that by using this cautionary instruction, it places the Court in a position of basically commenting on Mr. Saffell's credibility which Mr. Bourgeois has done a good job of impeaching. But I believe the standard impeachment instruction given to the jury as to how they view witnesses would be more appropriate. I can understand in the situation where there's prior perjury because there's been a finding that the individual perjured himself, which I believe gives the Court the opportunity to make a cautionary instruction. But that's not the case in this situation. And I believe it places you in a position of telling the jury watch out what this guy said. Whereas the standard [246] instruction provides a little more balance—

THE COURT: Where is the standard instruction that you're referring to? What number?

MR. WALLNER: I'm sorry, Your Honor. That would be the one I would think where you just, a review of all the evidence and—

THE COURT: Witness credibility.

MR. WALLNER: Yes, Your Honor.

THE COURT: Instruction Number 15.

MR. WALLNER: On page 18, the first full paragraph. How much you choose to believe the witness may also be influenced by witness bias. Did the witness have a relationship with the Government or the defendant? Has it affected the way he testifies? Did the witness have some incentive, loyalty or motive? I believe that actually covers the area better than the Court commenting on Mr. Saffell's credibility by issuing, especially using the word cautiously when there's been no prior proof of perjury.

THE COURT: All right. Mr. Bourgeois, do you have any authority for this instruction?

MR. BOURGEOIS: I do not, Your Honor.

THE COURT: All right. I will sustain the Government's objection on that. Clearly, Instruction Number 36 will be deleted and we'll have to re-number and I'll so note to my clerk in that—it's only when there's been a finding of perjury that [247] the Court can then comment upon the testimony of a witness.

MR. BOURGEOIS: Your Honor, if I might—

THE COURT: Actually, just one second, Mr. Wallner. The standard instruction has been there has been evidence that a witness who testified at this trial lied under oath in another proceeding. That doesn't involve any finding of guilt or perjury. It's

merely that there is evidence submitted that a person lied under oath at another proceeding.

MR. WALLNER: Well, correct and that would be—

THE COURT: But there would be no finding of perjury there.

MR. WALLNER: But there's still a finding that the individual lied because there would be a production of a transcript where there would be variance as to the testimony which the jury can find. But that's not the situation here. Mr. Bourgeois did an excellent job of bringing out all the issues that Mr. Saffell has. But I think that goes to the witness credibility instruction, not the Court commenting on his—

THE COURT: All right. I'm going to sustain the Government's objection to that instruction and your exception is noted and—

MR. BOURGEOIS: Thank you, Your Honor.

THE COURT: And for the record, we'll make sure, Mr. Bourgeois, I'm going to give this to the clerk. This is definitely to be part of the record. The defendant is requested [248] the proposed instruction as I have read will not be given and I think it's incorporated in the standard Instruction Number 15. And so Sand and Seifurt 718, it would not be applicable and that will be deleted from the package that will be read to the jury and given to the jury. Then the matter of spoliation of evidence is an additional instruction that you've requested, Mr. Bourgeois.

MR. BOURGEOIS: Yes, Your Honor. We discussed this a little bit yesterday on the record. I'll simply amplify this. I made reference to an Indiana case or two and in doing some further research, I figured it might be a little more helpful to look in the federal

cases and I found this Fifth Circuit case out of 2000. *United States v. Wise*. Now I will tell you in that case, the court declined to give the instruction. But the court did hold that it is within the court's discretion to give such an instruction. Now in that case the evidence that went missing was not in government custody. It was a witness' computer. He managed to erase some data relating to emails because he kept his computer and loaded new software on it. So the Government noted there was no bad conduct on the part of the Government. I'm sorry. The court noted there was no bad conduct on the part of the Government. There is a requirement before the spoliation instruction can be given of "bad conduct". That has not been defined so far as I can tell. But there are cases in which, for example, the instruction was requested, but the evidence was not [249] missing or gone when it was in the sole custody of the Government. It may have been in the, both sides may have had access to it or the defendant had an opportunity to review certain evidence by its nature would disappear, but elected not to. In this case that wouldn't apply. So I would suggest based on Sergeant Smith's testimony, he's under an obligation to maintain in a proper fashion this evidence. We're talking specifically of course about the audiotape of the—

THE COURT: Not the videotape of September 14, 2004, but the audiotape of the telephone call prior—

MR. BOURGEOIS: That's correct, Your Honor.

THE COURT:—to the control buy.

MR. BOURGEOIS: That's correct, Your Honor.

THE COURT: And the fact that it was lost.

MR. BOURGEOIS: It was lost by the Government. There was no involvement by the defense in that. The defense was not given an opportunity at any point to do that and I would suggest that a failure of a law enforcement officer with 19 years of experience to maintain safe control and custody of evidence in a criminal case in which a man's freedom is at issue constitutes bad conduct. I don't suggest it constitutes malicious conduct, but it is certainly bad conduct. And so on that authority, *United States v. Wise*, I would suggest that the proposed jury instruction on spoliation would be appropriate.

THE COURT: All right. You've noted that the case I itself declined to give this instruction, but discussed the matter of the discretion of the Court. United *States v. Wise*, 221 F.3rd 149, a Fifth Circuit opinion 2000. The requested instruction by the defendant is as follows: There has been evidence in this case that the Government has lost certain evidence. You may draw an inference that the evidence that the Government lost was adverse to the Government's case. It is however for you to decide whether such an inference should be drawn. That requested instruction will be denied. There is no evidence of bad faith on the part of the Government. Quite simply, the officer can't find the tape of the telephone conference. There is no basis, that any cases that have been cited to me that would support instructing the jury that they should draw an inference that the lost evidence was adverse to the Government's case. But your request in that regard is noted and I'll give the clerk a copy of this requested instruction as well and make it part of the court file and that requested instruction is denied. Anything further, Mr. Bourgeois?

MR. BOURGEOIS: Just a housekeeping matter. I understand that once you instruct the jury at the close of our arguments, I'm required to renew my requests and exceptions. How do you want me to handle that? Simply to tell you that I renew my objection?

THE COURT: The record will reflect that any exceptions are—what I do is I instruct the jury. Then I have you [251] approach the bench in case I haven't read exactly as I said I was going to read. To the extent any other exceptions have been noted either yesterday or today, they are already preserved. You need not repeat all those. They are preserved.

MR. BOURGEOIS: All right. Well, I will simply make a reference, Your Honor, that the jury instructions that I have requested yesterday that you did not give, I request that you give and please note my exception to your failure to do that because I think as a matter of procedure, I'm still required to do so because the Fourth Circuit and other courts have said you have to give the judge one last opportunity.

THE COURT: That's fine. That's fine. And so to the extent there is any instruction that is not incorporated in the instructions that I'm giving, then your exception is noted in that regard, although with one exception. You have noted that you're not entitled to an entrapment instruction.

MR. BOURGEOIS: That's true, Your Honor.

THE COURT: All right. Okay. That's fine. All right. I think we're ready now to bring the jury back in. We will have the Government submit the two exhibits and rest. I will then bring you up to the bench. We will then note that the Government has rested. That the defendant is not—at the bench here, we'll reite-

rate on the record that the defendant is not testifying and the defense will then rest in front of the jury and we will proceed immediately then to closing arguments.

[252] MR. WALLNER: Thank you, Your Honor.

MR. BOURGEOIS: Your Honor, I need to pick up the receiver for Mr. Wright.

THE COURT: Yes, yes. Certainly. Thank you. I think we can bring the jury back in. By the way, counsel, the instruction if you'll note in the finalized version just summarizes the indictment without the indictment going back into the jury room.

MR. WALLNER: Yes, Your Honor.

MR. BOURGEOIS: Thank you, Your Honor.

(Jury present.)

THE COURT: Good morning, everyone. You all may be seated. I'm sorry to keep you waiting this morning, but I think you'll find that we've been able to expedite some matters and so it's been everyone's interest for you just to wait a few more minutes there in the jury room. I'll now call upon the Government. Mr. Wallner, any further evidence from the point of view of the Government?

MR. WALLNER: Your Honor, formally, the Government moves in Government's Exhibit 5A and Government's Exhibit 2, the videotape and the DEA-7 and with that, Your Honor, the Government would rest.

THE COURT: All right. No objection, Mr. Bourgeois?

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. Government Exhibit 2 and

[252] Government Exhibit 5A will be introduced into evidence. And counsel, if you'll approach the bench? Do you have your headset down there, Mr. Wright?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

(Bench conference:)

THE COURT: The Government now having rested, Mr. Bourgeois, you want to renew your Rule 29 motion?

MR. BOURGEOIS: I wish to renew my Rule 29 motion for judgment of acquittal on all the grounds that we discussed, Your Honor.

THE COURT: And for those reasons that I previously stated, that motion is denied. But you have preserved all those issues that you've previously raised. Now the defense will now rest in the presence of the jury. Is that correct?

MR. BOURGEOIS: That's correct, Your Honor.

THE COURT: All right. I've advised the defendant of his right to testify or his right not to testify. I've explained his rights that relate to him. Anything more the Government thinks needs to be addressed on that point?

MR. WALLNER: No, Your Honor.

THE COURT: From the defense?

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. You all may return to your table.

[254] (In open court:)

THE COURT:, All right. The Government having rested. Mr. Bourgeois?

MR. BOURGEOIS: Your Honor, the defense rest.

THE COURT: All right. The defense rests, ladies and gentlemen, which means this case is now ready to go and proceed to closing argument by counsel. Ms. Moye has given you menus so that I think you've had a chance to place your orders. We'll have closing argument this morning followed by instructions from the Court on law and by the time that's finished, your lunch should be arriving for you and you're guests of the U.S. Court with respect to lunch and we pay for that. Sometimes Ms. Moye fixes lunch herself. Not really. She's an excellent cook. But we are just kidding, Ms. Moye. But she's very efficient in that regard and they know to respond to her when she places those luncheon orders. So we'll now proceed with closing argument. Mr. Wallner, for the Government.

MR. WALLNER: Thank you, Your Honor.

Ladies and gentlemen, good morning. A conspiracy is a contract, an agreement to commit a crime. The defendant in this case is charged with two counts. The first of those is a conspiracy. A conspiracy is a contract. The agreement itself is the crime. No crime actually has to be committed. In fact, if the evidence would show that the defendant and another person engaged in the idea of supplying drugs to Mr. Saffell and [255] couldn't supply those drugs, you may under that evidence if you believe they entered into an agreement still find Mr. Wright guilty. That's not what happened in this case. What happened in this case is on September 14th of 2004 and you've heard that date several times now, Detective Thomas Smith, Detective Duane Crawley had Mr. Saffell place a telephone call which we've all heard about now to Mr. Wright. And then Mr. Saffell within ten

minutes of that telephone call was equipped with a video recorder, a body wire, a DEA-provided vehicle and he drove to the 2200 block of Madison Street in Baltimore City to pick up the defendant. Now you've seen the issues with the evidence. You've seen the video. You've heard the audio and we're going to highlight a few of those points for you right in a few moments. But what I want to point out to you is the video itself is important in two segments, the first 20 minutes technically and the last 20 minutes. There are other parts where the individuals get out of the car and you should not discount those. But essentially the first 20 minutes of this videotape is the agreement. Mr. Saffell picks up Mr. Wright. As soon as Mr. Wright gets in the car and you're going to have the opportunity to listen to this videotape as many times as you want until you're satisfied you can either hear what's being said or determine that you don't understand what's being said. What is actually said when Mr. Wright gets into the car because Mr. Saffell actually speaks over him is Mr. Wright says what's up. [256] What do you need? Mr. Saffell is speaking over him. But you can clearly make those things out if you listen and take your time and review the videotape. Immediately following that statement, Mr. Saffell responds I'm looking to get two hard. And now as I told you in opening statement, you've had your education and you know what two hard means. He was looking to get two ounces of crack cocaine. For the next 15 minutes or so, Mr. Wright makes telephone calls and you can clearly hear the distinction between whether Mr. Wright is speaking to someone on the phone or whether he's speaking to Mr. Saffell. At a point during the conversation, Mr. Wright says I'm at 1600 Madison. Well, as Mr. Saffell tells you they weren't on the 1600 block of Madison and what

that actually was was a telephone call to one of Mr. Wright's, what Mr. Saffell termed connects. The 1600, the price. $1600. If you listen to the rest of that telephone conversation, what you can hear on the videotape, he says do you feel me, do you understand, do you know what I'm talking about like I'm not really at 1600 Madison. Do you understand what I'm saying? Do you understand? Then the last part of that conversation he says it will be no, you call me back in 15 minutes. He hangs up the phone. Actually, you might be able to hear it click, the phone close on the video. And then he turns to Mr. Saffell and says it will be 15 minutes. You need to parse out on the videotape what is actually going on.

The second count of the indictment is possession with [257] intent to distribute those drugs on September the 14th of 2004. The judge is going to instruct you in a few minutes what possession with intent means. It means to distribute or have an intention to distribute. You heard from Detective Crawley the quantity of drugs, how the drugs are broken down. It's for street distribution purposes. Mr. Wright puts Mr. Saffell in contact with Mr. Couther for the purposes of obtaining drugs. And then we get to the second part of the videotape. The first thing I want to do is I want to show you on this video and, Madam Clerk, if I could ask you to turn the lights off just briefly. Thank you. Listen carefully to what's said as you observe the individual come down the steps in the 2200 block of Madison and get in the car.

(The videotape was played.)

MR. WALLNER: Listen again.

(The videotape was played.)

MR. WALLNER: What's up? What are you trying to do? And the response is trying to get two hard.

The next portion of the video after those first 20 minutes or so are Mr. Saffell and the defendant driving around. At various points, as you've heard through testimony, they went to various locations. The Baba Johnny market, the Prima Foods location where Mr. Saffell freely admitted that Mr. Wright went in and had a conversation about obtaining a job at that particular location. But if you listen to the videotape a little [258] while later, Mr. Wright actually says I'm trying to get this money together, meaning this deal. I'm going to get some work and then it's game over. Game over, I'm not going to deal drugs anymore. He actually says, I can no longer and uses an expletive with the individuals down there because I'm always wanting to fight those guys. He's talking about he doesn't want to deal drugs anymore because he can't deal with the individuals that are involved in the game. It's on the videotape. It's in the audio. You can hear it.

I recognize in this particular aspect of things of having you watch this videotape or listen to this videotape again for two hours would be, constitute cruel and unusual punishment. I recognize that. But I'm going to highlight a couple of points for you and as you all know now that the videotape doesn't have the right date. But I use the times at the bottom of the tape. So as you review it, you can speed through to different points, take as long as you want, take as little as you want, watch as much as you want. But look at these few times and write these down so you can look at them later. At 12:16:30, that's the time in the bottom left hand corner, not the time of the incident, but the time on the video counter, that's when

Mr. Wright enters the vehicle. At 12:19 or thereabout is when he has a conversation about 1600 Madison. At 12:22, I'm sorry, at 12:23, Mr. Wright indicates that he's going to give the whole 2,000 to his man because he still owes him $600 and he's hoping to get something. [259] At 12:27, there's a conversation where Mr. Wright identifies himself on a telephone call to another person as Daddio. He then proceeds to say, I got to see you real quick though and it's something beneficial. He called another connect. At 12:31, he then talks about how he's going to go and get them for seven a piece and owes the guy 600 and he's hoping to squash the debt by doing this. At 12:40, Mr. Wright makes a comment, let's bounce, there's too many police out here. This is after they go to the Baba or I think it's after they go to the Baba Johnny's Restaurant and then they exit the vehicle. From then until 1:15, they're just driving around talking. At 1:15, that's when they get out of the car for the job interview. I'm sorry. At 1:15 is when—that's the second meeting. I apologize. In there you know that they are going to get ready and get out for the job interview and you'll see that and I'm sure defense counsel is going to highlight those times for you. But at 1:15, there's a conversation because they have now made a connection with Mr. Couther. And if you recall, Mr. Saffell testified that he had been provided drugs by Mr. Couther through Mr. Wright on one other occasion and there's this exchange. Mr. Wright gets back in the car and he says yo going to ride with us. Mr. Saffell responds where are you going to ride with us to. Mr. Wright, the defendant, replies probably his spot. Mr. Saffell then responds where is that at and the defendant replies Northern Parkway, where we were at last time. Within six minutes of that [260] conversation, Mr. Couther gets in the car.

At 1:31, Mr. Couther tells Mr. Wright to make a left. They pull over and then Mr. Couther after a conversation is visibly observed leaving the vehicle. And sometime about 1:44, Mr. Couther is observed walking back to the vehicle. And now, Madam Clerk, if I could have those lights?

(The videotape was played.)

Mr. Couther is walking back to the vehicle. Watch again.

(The videotape was played.)

MR. WALLNER: You'll hear the car door open.

(The videotape was played.)

MR. WALLNER: Did you catch that? I'll show you one more time and you can review this as much as you want. Mr. Wright actually reaches into the back seat. You can just see the right hand of the passenger reach into the back seat. He says something and reaches into the back seat. Look up where the trees are.

(The videotape was played.)

MR. WALLNER: Do you see it? One more second.

(The videotape was played.)

MR. WALLNER: See the hand-to-hand transaction. I want to turn this down for just a moment so we can just focus on what you actually observed. Mr. Wright who has previously reached into the back seat. Mr. Couther reaches across. Where did he [261] say he put it? In his waistband. Did you see his hand go up to his waistband area where his watch is in the top right hand corner of the screen. We can watch it again.

(The videotape was played.)

MR. WALLNER: Mr. Wright's hand, Mr. Saffell's hand to his waistband, up here where you saw his watch. That's the transaction, ladies and gentlemen.

Now ladies and gentlemen, in a moment, Mr. Bourgeois will get up and he'll have the opportunity to address you and I will have the opportunity to address you one more time. I would implore you, I gave you those times, listen to those conversations. Watch that videotape where I just pointed out to you. Watch the hands move back and forth. Thank you.

THE COURT: Thank you, Mr. Wallner. Mr. Bourgeois?

MR. BOURGEOIS: Thank you, Your Honor. May I approach one second?

THE COURT: Certainly.

(Bench conference:)

MR. BOURGEOIS: Your Honor, I would like to play just a very brief portion and I wonder if we could give the jury a two-minute break to stretch their legs while I queue it up.

THE COURT: Why don't you just do it now? By the time they leave and come back in again

MR. BOURGEOIS: All right, Your Honor.

(In open court:)

[262] THE COURT: We're just going to have a little bit of a delay before Mr. Bourgeois starts his closing argument because he's trying to get a portion of the tape ready. So just bear with us for a second, ladies and gentlemen.

(Pause.)

THE COURT: Mr. Bourgeois, are you ready?

MR. BOURGEOIS: Yes, Your Honor.

THE COURT: All right.

MR. BOURGEOIS: Good morning. This is my last opportunity to chat with you. Mr. Wallner will, of course, have one more opportunity to talk with you. He will I suppose get to address some of the things I have to say. I will not have that opportunity. So I hope I answer your questions to the best of my ability and I hope that Mr. Wallner does not raise any additional questions that I didn't think of because I'm not going to have that opportunity. The Government has two shots here. I have one.

When we first chatted, when I first addressed you, I pointed out that this case was about an education, not your education, but the failure of education, the problems in this case with the law enforcement techniques and the way they were carried out and the implications that that has for the life of my client, James Wright. You are the last bullwork of freedom in a democracy. I'm not going to waive the flag too much, but I want you to understand, each of you, the importance of your role in [263] this courthouse and in our democracy.

The Government to put us in jail in federal prison on a State lockup must prove that we are guilty of a crime and it must do so beyond a reasonable doubt. It's an extraordinarily high standard of proof. It's a check on the Government. It's a requirement that we have imposed on the Government that if it's going to take our liberty, that it's going to have to meet an extraordinarily high burden and I would suggest, ladies and gentlemen, that that burden has not been met. I'm not going to insult your intelligence. I'm not going to tell you that it's impossible that what the

Government contends happened happened. What I am going to tell you is that based on this kind of evidence, the ineptitude of the performance of law enforcement officials to whom we trust our lives and well being, that is not the kind of evidence that we in a free society will send our people to prison for. We expect more. We demand more. I can give you a laundry list. I promised you I would at the beginning of this case and I want to summarize it for you.

Sergeant Tom Smith, the case agent along with Detective Crawley. Sergeant Smith, a man of 19 years experience, he claims that he recorded a setup call between Mr. Saffell and Mr. Wright. He told you because I asked him about the importance of concepts such as chain of custody, when we collect evidence at a scene of a crime, we put a sticker on it, we label it, we want to preserve its integrity. So an officer puts his initials on it. An [264] officer puts the case number on it, the date it was collected. If it's a videotape or an audiotape, the subjects of the conversation. Why? So defense lawyers like me later can't come along and attack the Government's evidence. Fundamental police work 101. Well, Sergeant Tom Smith said he recorded this setup call and what did he do with it? He put it in his personal file, put it in his briefcase. He works out of the same HIDTA headquarters or worked at the same HIDTA headquarters with Detective Crawley. He didn't put it in the evidence safe. He put it in his personal belongings. Claimed it was lost in the shuffle and he was suddenly without any notice removed from the HIDTA Task Force. This is an officer with 19 years experience in a federal drug trial has lost key evidence. That's just the beginning.

Then we turn to the setup. We have a setup call, we don't have evidence of. That's been lost by law enforcement. They admit it. Then Detective Crawley and Tom Smith, Sergeant Smith say they met with Mr. Saffell for purposes of equipping Mr. Saffell with a vehicle that is equipped with recording device to send him off on his way.

The decision to use Mr. Saffell, we heard an apology for that in the opening statement. It's not the kind of guy you want to have dinner with. Well, that's the understatement of the year. Mr. Saffell was not thrust upon law enforcement here. They didn't have to use him. Sometimes when a crime is [265] committed, the only witnesses to that crime are people that we might not want to have dinner with. But this was a choice by the Government to get in bed with Mr. Saffell. We'll get to Mr. Saffell in a few minutes. There are lots of problems with him.

But what did Detective Crawley and Sergeant Smith do with Mr. Saffell? Well, we have two contradictory versions. One of those officers lied. And I submit, ladies and gentlemen, it was Sergeant Smith, the guy who was running Mr. Saffell. The guy who brought Mr. Saffell on board, even though he knew that Mr. Saffell was double dipping as he put it. That he was running an ectasy lab secretly setting it up to sell drugs on the streets to our kids, hundreds and thousands of pills. The fact that he got busted in January 2004. Sergeant Smith knew all of this. So I suggest that his agent went bad on him and so perhaps that's a motivation for why Sergeant Smith is less than credible. He told you, he told all of us in this courtroom that he provided the $2,000 to Mr. Saffell. He said it was in denominations of 10 and 20. Well, Detective Crawley testified later that it was he

who provided the money to Mr. Saffell and said it was in denominations of 50.

Now do you know why I think that Detective Crawley was telling the truth and Sergeant Smith was lying? Because Detective Crawley kept and it's in evidence a document, an inventory of the money with the serial numbers and the $50 bills. [266] Sergeant Smith said he searched the vehicle before Mr. Saffell got in the vehicle and said it was clean of drugs and contraband. And what did he also say? That there was no scale. Detective Crawley said the vehicle was searched. There were no drugs or money and a digital scale was provided. Again unbelievably I'm going to invoke Mr. Saffell is credible on this one. He said the government agents gave him a scale. Sergeant Smith is all over the map here.

Now why would Sergeant Smith make it up about the money? Tens and twenties and not 50's. You know, human beings are very strange lots. Sometimes we lie for good reasons, sometimes we lie for bad reasons. Usually people lie when they're caught in an uncomfortable situation and they're trying to minimize it. The uncomfortable situation here Your— I was about to call you Your Honors. You judges of the facts. Well, I guess you are Your Honor. The uncomfortable fact for Sergeant Smith is Mr. Saffell stole some of that government money. This was government setup money. He was supposed to go buy drugs with it. This is a man trying to save his skin he told you. He's going to do the best he can. But did he take this obligation seriously? No. He was going to burn the Government again. He's burned them time and time and time again and he burned them again. He took some of this money the Government provided him and he went and bought at a minimum, soda and

cigarettes. Detective Crawley told you, Mr. Saffell told you. He did it with [267] the government supplied funds. Well, I guess it's a little more uncomfortable to know that the man had $50 bills and was flashing that around buying personal belongings as opposed to ten dollar bills. It sounds a little more likely, a little less culpable perhaps. Maybe that's why Sergeant Smith is making it up. I don't know. I'm not inside his head. I'm not a psychiatrist or a psychologist. I'm just gravely concerned as I believe we all should be about why this law enforcement officer has demonstrably gotten up there and told you things that you know aren't true. He's lost evidence. He's misled you regarding the quantities of money. He's told you there wasn't a scale in the car. We know there was. Sergeant Smith is not a credible person.

Now Detective Crawley is a much more compelling individual. I believe he was truthful because he got up here and he admitted forthrightly the numerous, numerous errors that he made and that other law enforcement personnel made. He admitted to you critically that it's possible that Mr. Saffell smuggled money in addition to the government money into that car. Maybe that's how Mr. Saffell purchased the cigarettes and the soda with the $20 bill that he didn't have. Mr. Saffell suggests he bought it with a $20 bill. But he so says he got it from the Government. Detective Crawley also acknowledges that this gentleman, Mr. Saffell, could have smuggled into this car drugs. And, you know, I commend Detective Crawley. Had Sergeant Smith gotten up there, he would say no way, impossible because Sergeant [268] Smith has demonstrated to us that he has a way with the facts. But Detective Crawley acknowledged that this gentleman, Mr. Saffell, could have brought those drugs

into the car, could have brought money into the car, notwithstanding the search.

Detective Crawley also acknowledged other errors in the case. He acknowledged that he took this, he placed the video cassette into the vehicle at the beginning of the operation. He took it out at the end of the operation. He did not do what Sergeant Smith says Police 101 tells us to do. He did not put a label on it. He did not label this cassette with the date it was recorded, the case number, the subject matter, the witnesses being recorded. He put nothing on it. It was a blank cassette tape. I mean not blank. There was something on the recording. But, you know, it's not labeled in any fashion. Put it into his case folder. Then he went to the HIDTA office and put it into an evidence control setting where it sat for between one to five days before Detective Crawley ever looked at it and reviewed the videotape. And he told you forthrightly there are ten other officers all working active drug cases that involve tapes and drugs and everything else and each of those officers had access 'during that five-day period, one to five-day period to that safe. So it's not like he's the only guy sitting there with a combination and nobody else has access to this thing. So we have an unlabeled tape sitting for a period of time. What do we know about the tape? Detective Crawley reviewed it finally to make a [269] copy, a VHS that you've looked at and we know its date is January 1, 1993. We know its time is 12:15 in the morning. Well, according to the law enforcement personnel, this operation took place on September 14, 2004 and it took place at 3:15 or thereabouts in the afternoon. So the date is wrong. The time is wrong. According to John Flickinger, DEA agent, he seen that before. Is that what we expect from our law enforcement personnel? Again, this is key evidence in

a case that is designed to send this man to federal prison. And our law enforcement officers, our federal authorities and our state authorities gathering together in a task force. Something as fundamental as the key piece of evidence in a case, they have prior notice that there are these issues and do nothing about it. Well, that's not fair. Detective or Agent I should say Flickinger said that although he can't work a VCR, he went personally into the DEA's vehicle and tried to fix it to no avail. He acknowledged that someone either kicked or banged or did something to the camera. So it's virtually useless as a video, a piece of video evidence. We don't see faces. The camera does not capture the driver's face or the passenger's face.

Now Mr. Wallner did an excellent job in taking about the most ambiguous piece of this tape where you have a flicker here and you have a hand in the course of turning a car to the right. You will hear what they contend that Mr. Couther saying [270] turn a right. So you see the driver's hand going go to the right and turning that into that's the transaction. Excellent job in making chicken salad out of chicken manure. We don't know what's on that tape. We know there's a lot of talk. But I want you to take up his challenge. I want you to view this tape. The judge told you and I think will tell you again. The transcript that the Government presented you with is simply the Government's version of what people are saying on that tape. The judge of what's on that tape, the judges are you folks. It's your memory and your memory, not the transcript, your memory can be enhanced. You can look at this videotape in the jury room and I challenge you. Do it. I'm not running from this videotape. I think the videotape is compelling evidence of the ineptitude of what was going on here.

Let's talk a little bit about Mr. Saffell. I don't need to say a whole lot about him. I'll tell you if I had two people in this room and I asked them was it raining outside and Mr. Saffell said yes, I wouldn't go outside with an umbrella. Reasonable doubt. The Government has to prove its case beyond a reasonable doubt before it sends Mr. Wright to prison. Let me ask you would any of us make a key life decision, any of us based on the word of Mr. Saffell? Because that's the decision you're going to have to make is a key life decision beyond a reasonable doubt. Jeffrey Saffell? The guy couldn't walk straight much less testify straight. He told you at the beginning of his [271] testimony that he gave the money to Mr. Couther. And do you know why you remember that? Because he's trying to explain he was uncomfortable. He didn't want to front money. He didn't want to give money in advance some time in advance of actually getting the drugs, but he was uncomfortable. He gave the money to Mr. Couther. Now you remember the last two questions I asked Mr. Saffell. He changed his testimony on the stand. He said he gave the money to Mr. Wright. I said are you sure it was Mr. Wright? Yeah, I'm sure. I guess he had forgotten because he had smoked so much pot that at about 20 minutes earlier, he said he had given it to Mr. Couther. Well, Detective Crawley again being forthright told us what Mr. Saffell told him right after this alleged transaction. He said that Mr. Saffell gave the money to Mr. Couther. Well, what is it, Jeff? Who knows? Mr. Saffell is not a reliable person and frankly, I'm astounded and shocked that our Government decided to rely on him in this case. He cut a deal after his God knows how many convictions he got. He knew he was doing big time. As he put it, he knew he was facing mandatory jail time in Baltimore City. So he

did what most people do. He tried to make the best of a bad situation. He cut a deal. He was going to be a cooperator and set other people up. Okay. Well, that's a deal with the devil. But I understand why law enforcement agencies do it. It's a way to fight crime. And he promised in that deal that he would walk straight until he was sentenced. He was going to put on the best [272] show he could. Why? Because, A, it helps him. But, B, the Government doesn't want tainted witnesses. He's tainted enough because of his prior criminal activity. But while he's acting as a government agent, they don't want him double dipping as Sergeant Smith so nicely put it. Well, what did he do? Almost immediately he got himself involved in a lab. He wasn't just going to sell drugs, he was going to make them. He was going to make ectasy. Ectasy is kind of a very pleasant sounding name for a street drug, club drug. MDMA is its initials. I know the last MA is methamphetamine. I can't pronounce the first part. It's a scourge right now. He was going to manufacture and he admitted it hundreds of thousands of pills at 10 to 15 bucks a pop. Put them on the street, sell them to young people. That's what this government agent was doing while he was double dipping. He got busted in January 2004 with cocaine. Arrested for possession with intent to distribute while a government agent. Now Sergeant Smith tried to fudge it a little bit. He kind of suggested he knew all along that Saffell was running the MDMA lab, the ectasy lab. That's not true. Mr. Saffell brought that to Sergeant Smith's attention after Mr. Saffell was arrested on January 2004. He knew his goose was cooked. So he was going to come clean. He was going to deliver up his co-conspirators in the meth lab. He was going to make calls to people like him and do everything else he could.

Mr. Saffell told you his motive for testifying. It was [273] I know I'm getting a ten-year sentence. That's what everyone tells me in Baltimore City for a drug conspiracy several years ago. But I hope everyone is going to bring it to my—you know, I hope I'm going to bring it to the Court's attention about all the good things I'm doing. Sergeant Smith said yeah, I intend to bring it to the Court's attention. Mr. Saffell wants to deliver the goods on as many people as possible. So that hopefully the judge will not sentence him to ten years. The problem is we know Mr. Saffell. He will do and say anything. And if he can deliver convictions through good evidence or bad, he will. The man has a motive to lie. And he's demonstrated he's free with the truth. He does not—you know, he is not somebody any of us should believe and he certainly is not anybody that we should entrust our major life decisions with.

Now Mr. Saffell told you, tried to translate all the street slang and the drug talk, O's and onions means ounces. Who knows? Maybe they do, maybe they don't. I know that to the extent that I could make out any of the discussion on this tape and there were parts of it that are much more clearer than others, that you really have to take a leap of faith if you're going to accept what's on the transcript. Some of it's correct. Some of it's not. I can agree with portions of it. A lot of it I don't. The thing I agree with most in the transcript that you saw was where it said unintelligible. There are people talking over each other. They're talking in street talk. They're [274] talking over each other. Several things do come through though. Mr. Saffell told you this. Mr. Couther got in the car. I think I even know what time it was. 1:21 according to the wrong time here. And then Mr. Wright started getting extraordinarily uncomfortable

about Mr. Saffell's talking about buying drugs, talking about, hey, let's get some pot, hey, can you do this or that and he said, you know what, I may just have to catch a cab or a hack home because I don't want to be around you if you get pulled over. Now remember this is before Mr. Couther gets out of the car to go allegedly get the drugs. Mr. Wright is intentionally uncomfortable with Mr. Saffell's conduct and what's going on and says, you know, I may just have to absent myself from the scene. This is before Mr. Couther allegedly brings the drugs in. I'm going to suggest to you, ladies and gentlemen, that Mr. Saffell, has a lot of explaining to do. And law enforcement has something to explain. At 12—I'm sorry. I want you to write these numbers down to the extent you're going to review the tape. The only talk about money on this tape is at approximately 12:31 to 12:32. Somebody says count some money. At 12:33:00 to 01, that's the last time you hear or see any money. And if we've queued up this correctly. I'm only going to play it for one or two seconds. But I want you to look at the hand up top that's holding the money.

(The videotape was played.)

MR. BOURGEOIS: Right there. Keep watching. It's a [275] terrible picture. I want you to pause it at that point. 12:33:00 to 01. I'm not going to go back and forth on it. That is a white hand. A white man's hand holding money. This is after the discussion about count the money, this, that and the other. The last time anybody has any money in anybody's hand, that is a white hand. You can look at Mr. Wright. He is an African-American man. You saw Mr. Saffell. That's a white man. There was no hand off of any money from Mr. Saffell to Mr. Wright. Three minutes later or two minutes later, 12:35:40. All right. This is the Baba

Johnny's. Mr. Saffell gets out of the car. Mr. Wright has left the car. Mr. Saffell has left the car. This is three minutes after we see the money in the white hand. What is Mr. Saffell doing? We know that the police have told you that they have this roving eye on Mr. Saffell's vehicle. And yet not one of these people who testified, not Detective Flickinger, not Detective Crawley, not Detective Troy. I forgot Detective Troy's last name. None of them saw Mr. Saffell leave the vehicle. Remember this is the constant roving eye. Nobody told you. They said they saw Mr. Wright get out of the vehicle. Well, two seconds later, Mr. Saffell got out of the vehicle. Nobody saw that. He is still out of the vehicle. What is Mr. Saffell doing? This is where the alleged first drug buy was going to go down. Remember that's what they told you. There, Mr. Saffell returns. Let me stop it. That, ladies and gentlemen, needs some explaining.

[266] Now I'm not going to put you through this again. But Mr. Saffell left the car a second time. Remember Mr. Wright went on a job interview. There's a lot of talk about money and I think Mr. Wallner tried to highlight some discussion about Mr. Wright wanting to get some money and get a job. And Mr. Wallner suggested, well, he was going to do this last drug deal and then get a job. That's the same sentence. He's trying to get a job as a driver with a commercial driver's license. That discussion is on the tape. That's what Mr. Wright is concerned with money about. But there is another point and write this down, please. 12:55:38. That's the job interview at Prima Foods. Well, while Mr. Wright is on his job interview, Mr. Saffell gets out of the car. And you'll see that and he is out of the car for an extended period of time. What was he doing? What was he doing? Again, we hear about this roving eye with this

army of police cars passing each other off and passing the eye back and forth. Nobody saw Mr. Saffell get out of the car. But we know he was out of the car. He admitted he was out of the car. Detective Crawley admitted he learned after reviewing the tape that Mr. Saffell left the car twice. He learned it for the first time when he reviewed the tape one to five days later. With all this passing the eye and the radio contact, why was this news to the case agent? It's because they weren't watching carefully. John Flickinger, who's very candid, he said, yeah, you know, it happens. We miss it. We try and [277] pass things off. Sometimes you got to pass somebody and move on. We know that Jeffrey Saffell who's willing to steal government money on a drug operation so he can go buy himself cigarettes and a coke is a lifelong drug dealer. We know out of his own mouth that while he's working as a government agent, he's engaging in his true vocation, dealing drugs, manufacturing drugs. Why is it beyond comprehension if it is that at Baba Johnny, Mr. Saffell went out, hooked up with a drug guy and bought drugs? Why is it not inconceivable that Mr. Saffell while my client is on a job interview, hooks up and buys drugs. We don't know. We don't know. It's possible. I mean we know that Detective Crawley says it's possible that he brought the drugs in. I don't know what happened. And I told you I'm not going to insult your intelligence. It's possible what the Government said. But is there, is it not just possible? Has the Government proved to you beyond a reasonable doubt?

I'll tell you what we do know beyond a reasonable doubt. When they arrested Mr. Wright and Mr. Couther after they were dropped off, no money was found on their person. Where is the $2,000? Why all the effort to record the serial numbers? We don't

know. It was lost. We know that it's highly improbable that the transaction that's been described went down the way they describe it. You have Mr. Saffell saying he's uncomfortable about fronting money to somebody that he doesn't know and yet, he allegedly fronts money to Mr. Couther for a period of 45 minutes [278] and Mr. Couther disappears from the car for 15, 20 minutes. You don't hear Mr. Saffell saying what's going on, man, I don't know this guy. I just gave $2,000 to a guy I only know as D. Does that sound likely? We read in the news people getting killed for $15 debts on the streets of Baltimore City and Mr. Saffell is going to say without comment that a perfect stranger can take $2,000 of his money and disappear and not say, not complain on the tape about it? Highly unlikely. Mr. Saffell supposedly has a digital scale in his car. I guess to give this a patina of reality. How come that digital scale isn't used? How come if he is setting up a deal trying to create evidence against these guys, how come if, well, the way the Government describes it when Mr. Couther comes in and hands the drugs over, that Mr. Saffell doesn't say—he shouldn't be worried about them by the way, they're going to get arrested—thanks for the two hard, for the two O's. Is it two ounces? Let me put it on the scale or street words to that effect. It doesn't happen. This is the most trusting relationship as evidence in a transaction we know as common citizens is a very violent and untrusting trade. It just doesn't hold together.

If you'll bear with me one second because this is not me whose life is on the line. I'm going to confer with my client because he may have some points that I have missed. Please bear with me one second.

(Counsel conferred with his client.)

MR. BOURGEOIS: Mr. Wright brings up a good point. Mr. Saffell said that he had met Mr. Couther on a prior occasion. Why did he need to go through Mr. Wright? Why also when Mr. Couther gets in the car and the transaction allegedly takes place, there's not any discussion, there's not any discussion? How much is that? How much money? What's the quantity here? There is no drug talk whatsoever. When you listen to this tape or at least recall the transcript that you looked at, 99% of the talking about drugs, about eights and bricks and O's and hard and ready is Mr. Saffell. And that's 90% of the total conversation. Most of Mr. Wright's responses are noncommittal or sort of uh-huh or whatever. And on a few occasions if you listen carefully, for instance, Mr. Saffell saying, you know what we'll do, I'm going to get this drugs and I'm going to sell it, tomorrow we're going to go buy an eight ball and do this that and the other. If you listen carefully, you'll hear Mr. Wright say no. When Mr. Saffell is sitting there then trying to say, you know what, I got all these girls to use the perhaps more polite phrase in this motel and we're going to do all sorts of things all night long, why don't you come up with me? You know, he's talking, he's talking, he's talking his jive. What does Mr. Wright say? He says no. He says street words to the effect of I'm in a good relationship. Mr. Saffell is out there trying to tempt, trying to torment is talking, talking, talking, talking. Don't let Mr. Saffell's words be used against Mr. Wright. If you're going [280] to do that, then you listen to Mr. Wright's words and you conclude and I promise you you are going to listen to that tape again and it's not what the Government will contend. It is not proof beyond a reasonable doubt.

One thing the judge will instruct you, by the way, I want you to bear this in mind, there can be as a matter

of law no conspiracy between a person and a government agent. It is a legal impossibility. So you can't focus on whatever alleged agreement there was between Couther and Mr. Saffell or allegedly between Mr. Wright and Mr. Saffell. That is not a conspiracy. Mr. Saffell cannot be a conspirator. Bear that mind. And look at who's doing the talking and look who's trying to set it up and look at what the other people are actually doing to the extent you can discern anything.

I want to leave you with this thought. This is a tough case. It's a tough case for Mr. Wright and it's a tough case for you guys. But you have to conclude, each of you in your hearts and in your minds, if you're going to send this man to federal prison, that you know beyond any reasonable doubt what happened. And if there is reasonable doubt in your mind—I'm not talking about conjecture. We can conjecture. We can have a feeling, a pretty strong feeling of what happened that day. That is not sufficient. As guardians of our personal liberty, you have to demand more.

Let me give you a little trite thing I learned in law [281] school. First year people. There is a hierarchy of proof. Rumor is down at the bottom. Rumor is what you hear somebody talk about. We rely on that for nothing. Then there's something called reasonable articulable suspicion. And that is the circumstance in which a police officer is entitled to search your person on the street. If he can articulate something with reason to protect himself, he can search you, pat you down. Next step up, probable cause. That's what's needed for a warrant or an arrest. That means there is sufficient evidence to suggest that a crime has been committed and the person you seek to arrest or to

search that person's house is involved in that or did it. Then we come to if any of you have ever been on a civil trial that will only get you arrested. That doesn't mean you've done anything. Then we come to preponderance of the evidence. And in a civil trial, that's what a plaintiff needs to prove. In a private lawsuit between citizens over money, you need to prove your case by a preponderance of the evidence and the paradigm is, you know, the scales of justice. And if it's a little more so than not so. 51 % or a good plaintiff's lawyer will say 50.000001% is all a plaintiff needs to prevail. Little bit more likely than not. Then we have something called clear and convincing evidence and that's if you're going to get punitive damages or if you are going to establish that somebody defrauded you in a civil case, you got to prove it by more than a mere preponderance. You have to prove it by clear and convincing [282] evidence. If you're going to assess punitive damages on somebody. Not merely what you lost, but an amount of money to punish somebody, you've got to do it simply by clear and convincing evidence. And then if you're going to take somebody's liberty away, boom, the grand daddy of them all, beyond a reasonable doubt. So even if you believe by a preponderance of the evidence or by clear and convincing evidence that what the Government said happened happened, that is not sufficient. The Government has to prove to you beyond a reasonable doubt before it takes this man's liberty away. You know, you hold his liberty in your hands. You decide. You decide as the last bullwork of liberty. Where democracy works, it happens here. We all vote. We all say, oh, that's democracy. We also tend to believe that doesn't amount to a hill of beans individually. Well, this is democracy that's grass roots. You 12, 13, 14 people decide this man's fate. You all have been

extraordinarily attentive. I really appreciate that and Mr. Wright does, too. I trust you will do the right thing. Thank you.

THE COURT: Thank you, Mr. Bourgeois. Mr. Wallner?

MR. WALLNER: Thank you, Your Honor. Smoke and mirrors, ladies and gentlemen. Smoke and mirrors. Please ladies and gentlemen of the jury, don't focus on the fact that my client got into a car for two hours and he talked about drugs and he talked about drug dealing and he talked about profits from drugs, making profits, making connects, making telephone calls, talking [283] about who he owed and how much he owed his suppliers, complaining about the police presence, negotiating prices and profits for sale and ultimately providing the connection that produces the 50 grams of crack cocaine that you saw in this courtroom. Smoke and mirrors. Don't focus on that, ladies and gentlemen, because, number one, the police are incompetent and to throw in for good measure, now they're liars. Saffell is a liar and my client was riding around for two hours because he's going on a job interview. That's the defense boiled down to a nutshell.

So while it's smoke and mirrors, let's talk about each one of those things individually. The first. The police are incompetent. They made mistakes. Sure. They made mistakes. Could they have done a better job? Yes. But what did they make mistakes about? Process and paperwork. Not what they saw, not what happened. Evidence, ladies and gentlemen. You talk about process and paperwork. The main contention that the defense has and this is an argument that was made to you was that because the videotape has the wrong date stamp and Special Agent Flickinger got on the stand and told you why that happened

because when the car loses power, the date goes back to zero. Now I suppose you are to believe that the incident actually occurred on January the 1, 1993. Forget about the fact that you met Mr. Saffell and Mr. Saffell spoke to you for the better part of three hours from that witness stand and you heard his voice on that videotape. Forget about that because we can't be certain that the videotape because [284] of a date stamp is incorrect.

What is the complaint about Detective Crawley? Is it his paperwork because he made one date incorrect. Said he used the date of the incident, September 14th, instead of September 17th? Could they have done a better job? Sure. Detective Tom Smith, lo and behold, he's just a flat out liar. Never mind the fact that he has 19 years of experience, that a lie of the magnitude that Mr. Bourgeois is accusing him of would get him fired and possibly prosecuted. Forget about that. Detective Tom Smith is a liar. And why? And he's lying according to Mr. Bourgeois to protect Jeffrey Saffell. Does that make sense? Smoke and mirrors.

No dispersions were cast upon Special Agent Flickinger and Special Agent Wilson. And to some extent, Detective Crawley was praised for being up front and honest. But Detective Smith is a liar. If you're going to believe Special Agent Flickinger and Special Agent Troy Wilson, then you have to believe that Mr. Wright was the one that got into that car on September the 14th of 2004. Both of them testified that they observed him on several occasions from different angles in that car. And for the vast majority of the time this videotape ran, there were only two people in that car. Listen carefully to the conversations.

I noted in my opening remarks to you the time, 12:27. That's a point in the transcript where Mr. Wright actually calls and identifies himself as I indicated to you as Daddio. And he [285] says and this is from the videotape. "Can't really rap to you. You know what I mean? I got to see you. I mean it got to be quick though. Huh? You said hold on. No. It's something beneficial. But it's got to be quick. I'm down the hill." There's an exchange between Mr. Wright and Mr. Saffell about a cigarette. And then Mr. Wright says, "I want to go with the hard because I can put a couple dollars in my pocket." Mr. Saffell responds, "what, hard what?" Mr. Wright responds, "you said you wanted ready. I'm just going to get yo to cook it up. It's going to be butter though. You know what I'm saying? It's good. It's going to be good. That shit I can get." Mr. Saffell responds, "oh, he got to cook it?" Yeah, Mr. Wright responds. "Or I can get you the powder." Mr. Saffell then responds "no, I want the hard." If that is not Mr. Wright explaining to Mr. Saffell how he can provide him either powder or crack cocaine and what Mr. Saffell wants, I don't know what is. Listen to the videotape. Smoke and mirrors.

Mr. Saffell is a liar. Number two. Mr. Saffell is a liar. Well, he's a career criminal. There's a lot to work with there. Yes. He double-dipped. But now the defense has posited the theory that while knowing that he is under surveillance, body wired and driving around Baltimore City for two hours with agents on his tail being monitored, that he is somehow going to, one, get out of the car; two, evade surveillance; three, evade the audio transcription of the body wire that he was wearing, meet a [286] third party who he couldn't contact with Mr. Wright in the car while the police were listening and do a drug deal and get back

before some surveillance officer happens to walk by or drive by and see him. Remember, Special Agent Flickinger and Special Agent Wilson, no impunities were cast upon them. So we'll just talk about them for a moment. Special Agent Flickinger said that surveillance was constant except for a brief moment where somebody might turn around or pass somebody before it's handed off. A brief moment. Does that sound to you like the amount of time that the defense is suggesting to you it would take Mr. Saffell to do all the things that he was going to have to do to get these drugs and have to do it on the fly because after he made the call to Mr. Wright, he was in the car in ten minutes. He was driving around under surveillance. You listen to the videotape. Does he call anybody else to set up a drug deal? So the theory is he got out of the car and saw somebody across the parking lot who he went and got and got drugs from. Fifty grams of crack at that. Just, you know, not your average amount that a person standing on the street corner would have on their person.

Detective Crawley says it's possible that the defendant may have been able to get a dollar bill or some money into the car and it's possible that the drugs could have come in during the frisk. It's possible. Well, anything is possible. When they do the frisk, they pat you down. If you've got a folded bill in your pocket, it's possible you might miss the $20 bill [287] that's mentioned throughout this videotape that Mr. Wright, that he keeps trying to give Mr. Wright. But is it probable that 50 grams of crack—now I know you saw the 50 grams of crack as it was crushed. But as you heard Mr. Newby testify, he crushes it into a powder to make it in his words, homogeneous. That's to make sure that he can test any single part of it and it's not just little segments of it being crack. There's a

photograph in evidence Madam Clerk, may I have Government's Exhibit Number 6, please? This, ladies and gentlemen, is what the crack looks like before it was ground into a powder. It looks like a crushed dinner plate. You think that would have snuck by anybody patting somebody down before he got in that car? Do you think this is something Mr. Saffell could have ran out and got from this unknown third person that the defense now suggests? Detective Crawley told you they didn't limit Mr. Saffell to having to stay in the car. Why? Because if Mr. Saffell wouldn't get out, it might just make the other individuals in the car suspicious, placing Mr. Saffell, all the agents and everybody else in danger. So it's smoke and mirrors. They want you to focus on a wrong date on a report. The fact that the videotape is wrong. The video date stamp is wrong, not the evidence. Smoke and mirrors.

What a wildly contracted theory that Mr. Saffell either smuggled that into the car prior to getting on there so he had to obtain it from beforehand. I guess the defense would argue that Detective Smith gave it to him. I'm not quite sure or that [288] actually what happened, ladies and gentlemen, is that he picked up Mr. Wright after the telephone call, that they drove around for a period of time and they eventually met Mr. Couther who you can see get into and out of the car. And when he gets into the car the last time, you see the passenger seat and Detective Flickinger who, one of the only people who hasn't had his integrity impugned, says he was a passenger. Mr. Wright was the passenger. You see the hand turn to the back. And then you see Mr. Saffell reach across and take from the passenger that. (Indicating.) And then just a fleeting second later and Mr. Saffell told you he put it in his boxer shorts, you see Mr. Saffell's hand come up. It's a little obscurity there, but you can see his

watchband. Came up like this. Lean back in his seat and came up because he was shoving it down in his pants just like he said. And if you watch to the end of this tape, you will see as soon as the defendant and Mr. Couther get out of the car, Mr. Saffell picks up the phone, calls Detective Smith and they talk about where they're going to meet, where he's going to follow him and then you can watch the videotape run and you can watch Mr. Saffell drive all the way back to the meet point. You can watch Mr. Saffell get out of the car. You can watch Detective Smith get in. All of that is on that videotape. The defense wants to suggest to you that somewhere during the minutes or so that Mr. Saffell managed to get out of the car, that that's where all this took place. Smoke and mirrors.

[289] Mr. Saffell is a criminal. He's a bad criminal. He always gets caught. I mean he served seven years in prison. In the time that he was released from that, he was picked up again in a wiretap investigation. He's a bad criminal. So he may be a bad criminal, but do you reasonably believe that he would attempt to do what the defense has suggested he was going to do while under police surveillance? He's a bad criminal. But he's not an idiot. Do you think—you met him. Do you think he would be smart enough to concoct the theory that has been propounded to you by the defense without any eye on the fly after ten minutes after this conversation? Because the defense's theory is, ladies and gentlemen, Mr. Saffell goes and says he can set up Mr. Wright for some reason. He places the telephone call. Ten minutes later, he's out running around and in an effort to frame Mr. Wright, has either smuggled the drugs onto the car or then magically gets it from somebody else in the minutes or two that he's out of the car during the transaction. That's the defense. Smoke and mirrors. Ignore the video-

tape, ignore what's being talked about. You can literally follow it right through. Yes, it's crass. Yes, it's not rated R. It's probably worse than rated R. NC-17 I guess you might want to call it. But it's there. When Mr. Wright gets into the car, what do you want, what are you looking to do? Two hard. For the next two hours, there are conversations between Mr. Wright and other individuals about back and forth.

[290] Remember that Mr. Bourgeois told you that there was no conversation about how much money was going to exchange hands and Mr. Couther got in the car? Do you know why that is? Because Mr. Wright talked to Mr. Couther on the street and it's in the transcript the way it happened. It's on the videotape. At 1:15:55, Mr. Wright gets out of the car. At 1:19:36, Mr. Wright gets back into the car. And it is at that point where the conversation ensues where he says yo is going to ride with us. He got out of the car and spoke to him. He got back in the car, told him we were going to go meet him and then Mr. Saffell continues where are we going to meet him at. Mr. Wright says probably his spot. Mr. Saffell says where is that? Northern Parkway, where we were last time. Just like Mr. Saffell said I had gotten drugs from him on one other occasion with Mr. Wright. It's there, ladies and gentlemen. The rest is smoke and mirrors.

The Government doesn't deny the fact that during the course of this two hours that Mr. Wright went on a job interview. In fact, if you listen to the transcript, somewhere within the first 15 minutes or so, the first ten minutes, in fact it might actually be on the first couple of pages or the first couple of minutes in the transcript, Mr. Wright candidly asked Mr. Saffell. Yo, I need you to do me a favor. Can you take me over here so I can get this paper from this guy? The

Burger King on Erdman Avenue. Over by the Burger King on Erdman Avenue. He candidly asks him. Of course, then for two hours they drive around, have [291] job interviews and then obtain that. (Indicating.) Smoke and mirrors. It's all job interview.

And the whole idea that Mr. Wright is concerned or cautious or upset about Mr. Saffell and his kind of what he terms your way out in the open talking like that, anybody is listening because he is an innocent third party and caught in the middle of this giant frame-up conspiracy between Mr. Saffell and I assume Detective Smith to frame Mr. Wright is just preposterous. If you listen to the transcript and you listen to what is actually said, they exchange a conversation about what's going to happen when he gets the drugs. What are you going to do with that? I'm going to put it on me. And then Mr. Saffell continues to say no one—I'm paraphrasing—no one who's ever been arrested with me or no one who has ever been arrested with me has gone down with me because I would sign a piece of paper that says it was mine. Mr. Wright is concerned because they're going to meet Mr. Couther and when Mr. Couther gets in the car, they're all going to be riding around with this. (Indicating) What Mr. Saffell says is no. I'm going to put it on me. So if we get pulled over, the only person who's going to be responsible for it is me. It's not going to be what's called joint possession sitting in the glove box of the vehicle or in the console. It's going to be on me. And even if, even if they pull over and they want to arrest you all, I'll sign a piece of paper saying it's all mine, I'll take the heat. That's what he is saying and that's why Mr. Wright is [292] upset and that's why, man, I got to ride all the way back with you with this stuff? I think I'm going to catch a hack is what he said. Because when you get

it, I'm getting out. And there's a conversation a little while later where Mr. Wright says last time I saw, guys came out of everywhere driving a Tahoe, had a couple of little cars. None of them looked like police cars. Listen. It's there. Smoke and mirrors with the rest, ladies and gentlemen. Smoke and mirrors. Evidence of transcript, evidence of an agreement, evidence of possession with intent and evidence of the drugs. Thank you very much.

THE COURT: Thank you, Mr. Wallner.

Ladies and gentlemen, what we're going to do is I'm going to start with instructions. Actually, hold on one second. I'm going to start with the instructions in the case. These instructions will be tape recorded and you will have the tape recording, you will have the tape recording in the jury room when you deliberate. You will also have a copy of these instructions that I'm reading. So you need not write down verbatim what I'm reading. You will have a copy of it, but certainly you can make notes in terms of the instructions as I read them to you. I'm going to—I found talking to other jurors that it's helpful sometimes to break this up a little bit. So you're going to get a break in a few minutes. I'm going to start reading some of these instructions. Then we'll take a break, let you stretch, go into the jury room and we will come back and we will conclude [293] with the instructions and then you will begin your deliberations.

Members of the jury, you have now heard all the evidence and the arguments of counsel and are about to enter your final duty which is to decide the fact issues in the case. Before you do that, I will instruct you on the law. You must pay close attention to me now. I will go as slowly as I can and be as clear as possible. I told you at the very start of the trial that

your principal function during the taking of testimony would be to listen carefully and observe each witness who testified. It has been obvious to me and to the lawyers that you have faithfully discharged this duty. Your interest never flagged and it is evident that you followed the testimony with close attention. I ask you to give me that same careful attention as I instruct you on the law.

You have now heard all the evidence in the case as well as the final arguments of the lawyers for the parties. My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration. On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow. You should not single out any instruction as alone stating the [294] law. But rather you should consider my instructions as a whole when you retire to deliberate in the jury room. You should not, any of you, be concerned about the wisdom of any rule that I state regardless of any opinion that you may have as to what the law may be or ought to be. It would violate your sworn duty to base your verdict upon any other view of the law than that which I give you.

Your role is to pass upon and decide the factual issues that are in the case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of witnesses, you resolve such conflicts as there may be in the testimony and you

draw whatever reasonable inferences you decide to draw from the facts as you have determined them. In determining facts, you must rely upon your own recollection of the evidence. The evidence in this case consists of the sworn testimony of the witnesses, the exhibits received into evidence and the parties' stipulations, if any.

What the lawyers have said in their opening statements yesterday, in their closing arguments this morning, in their objections and in their questions to the witnesses is not evidence. What I say is not evidence. Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. I have no view whatsoever of the guilt or innocence of the defendant. [295] You should understand that the Court has no opinion as to the verdict you should render in this case. As to the facts, you are the exclusive judges. You are to perform the duty of finding the facts without bias or prejudice as to any party.

In determining the facts, I remind you that before each of you was accepted and sworn to act as a juror, you were asked questions concerning competency, qualifications, fairness and freedom from prejudice and bias. On the faith of those answers, you were accepted by the parties. Therefore, those answers are as binding on each of you now as they were then and should remain so until the jury is discharged from consideration of this case. You are to perform the duty of findings the facts without bias or prejudice as to any party.

You are to perform your final duty in an attitude of complete fairness and impartiality. The case is important to the Government because the enforcement of criminal laws is a matter of prime concern to

the community. It is equally important to the defendant who is charged with a serious crime. The fact that the prosecution is brought in the name of the United States of America entitles the Government to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All parties, whether Government or individuals, stand as equals at the bar of justice.

It is the duty of the attorney for each side to object [296] when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Counsel also have the right and duty to ask the Court to make rulings of law and request conferences at the bench out of the hearing of the jury. All those questions of law must be decided by me, the Court. You should not show any prejudice against an attorney or his client because the attorney objected to the admissibility of evidence or asked for a conference out of the hearing of the jury or asked the Court for a ruling on the law. As I already indicated, my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

The burden is on the prosecution, that is, the Government to prove the defendant's guilt beyond a reasonable doubt. As a result, the defendant begins the trial here with a clean slate. This presumption of innocence alone is sufficient to acquit the defendant unless you, after a careful and impartial consideration of all the evidence, are unanimously convinced beyond a reasonable doubt of the defendant's guilt. If the Government fails to sustain its burden of proving the defendant guilty beyond a reasonable doubt, you

must find the defendant not guilty. This burden never shifts to the defendant for the simple reason that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any [297] evidence.

Your verdict must be based solely upon the evidence developed at trial or the lack of evidence. It would be improper for you to consider in reaching your decision as to whether the Government sustained its burden of proof any personal feelings you may have about the defendant's race, religion, national origin, sex or age. All persons are entitled to the presumption innocence and the Government has the burden of proof as I will discuss in a moment. It would be equally improper for you to allow any feelings you might have about the nature of the crime charged to interfere with your decision-making process.

Under your oath as jurors, you are not to swayed by sympathy. You are to be guided solely by the evidence in this case. It is for you alone to decide whether the Government has proven that the defendant is guilty of the crime charged solely on the basis of the evidence and subject to the law as I charge you. It must be clear to you that once you let fear or prejudice or bias or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict. If you have a reasonable doubt as to the defendant's guilt, you should not hesitate for any reason to find a verdict of guilty. On the other hand, if you should find that the Government has met its burden of proving the defendant's guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

[298] MR. BOURGEOIS: Your Honor, may I approach? You misspoke.

(Bench conference:)

MR. BOURGEOIS: I apologize. I hate doing that. You said guilty when it said acquittal. You said guilty.

THE COURT: Did I say guilty?

MR. BOURGEOIS: Yes, sir. I apologize.

THE COURT: All right.

(In open court:)

THE COURT: Mr. Bourgeois has appropriately corrected me. That's why you get these to read. These are taken back to read and that's why I try to break these up. So that you could pay attention. I apologize. If you have a reasonable doubt as to the defendant's guilt, you should not hesitate for any reason to find a verdict of acquittal and it's so stated here, Instruction Number 9. On the other hand, if you should find that the Government has met its burden of proving the defendant's guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

The defendant did not testify in this case. Under our Constitution, he has no obligation to testify or to present any other evidence because it is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the prosecution throughout the entire trial and never shifts to the defendant. The defendant is never required [299] to prove that he is innocent. You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. You may not consider this against the

defendant in any way in your deliberations in the jury room.

As I told you before the trial began, there are two types of evidence that are generally presented during a trial, direct and circumstantial evidence. Direct evidence is the testimony of a person who asserts actual knowledge of a fact such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes no distinction between the weight or value to be given to either direct evidence or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

During the trial, you've heard the attorneys use the term, inference, and in their arguments, they have asked you to infer on the basis of reason, experience and common sense from one or more established facts the existence of some other fact. An inference is not a suspicion or a guess. It is a reasoned logical decision to conclude that a disputed fact exists on the basis of another fact which you know exists.

[300] I remind you that a lawyer's question to a witness is not evidence. At times a lawyer on cross-examination may have incorporated into a question a statement that assumes certain facts to be true and asks the witness if the statement was true. If the witness denies the truth of the statement and if there is no evidence in the record proving the assumed fact is true, then you may not consider the fact to be true simply because it was contained in the lawyer's ques-

tion. In short, questions are not evidence. Answers are.

The evidence in this case consists of the sworn testimony of the witnesses and the exhibits received in evidence. Anything you may have seen or heard about this case outside the courtroom is not evidence and must be entirely disregarded. Similarly, you are to disregard any testimony that I directed you to disregard or that I directed to be stricken from the record. You may not consider any exhibits which were marked for identification only, but were not received in evidence. You should consider the evidence in the light of your own common sense and experience and you may draw reasonable inferences from the evidence.

You have had an opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

[301] It must be clear to you by now that you're being called upon to resolve various factual issues under the indictment in the face of the very different pictures painted by the Government and the defense which cannot be reconciled. You will now have to decide where the truth lies and an important part of that decision will involve making judgments about the testimony of witnesses you have listened to and observed. In making those judgments, you should carefully scrutinize all the testimony of each witness, the circumstances under which the witness testified and any other matter in evidence which may help you to decide the truth and the importance of each witness' testimony. Your decision whether or not to believe a witness may depend on how that witness

impressed you. Was the witness candid, frank and forthright or did the witness seem as if he or she was hiding something, being evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness consistent in his testimony or did he contradict himself? Did the witness appear to know what he was talking about and did the witness strike you as someone who was trying to report his knowledge accurately? How much you choose to believe a witness may also be influenced by the witness' bias? Does the witness have a relationship with the Government or the defendant which may affect how he testified? Does the witness have some incentive, loyalty or motive that might cause him to shade the [302] truth or does the witness have some bias, prejudice or hostility that may have caused the witness consciously or not to give you something other than a completely accurate account of the facts he testified to? For example, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of the case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his own interest. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of the trial, then you should bear that factor in mind when evaluating the credibility of his testimony and accept it with great care. Similarly, you should consider evidence of resentment or anger which a government witness may have toward the defendant in assessing the credibility of that witness. Even if you find that a witness was impartial and not interested in the outcome of the case, you should consider whether the witness had an

opportunity to observe the facts he testified about. You should also consider the witness' ability to express himself. Ask yourselves whether the witness' recollection of the facts stands up in light of all other evidence. In other words, what you must try to do in deciding credibility is to size a person up in light of his demeanor, the explanations given and all the other evidence in the case just as you would in any important matter where you are trying to decide if a person is truthful, straightforward and [303] accurate in his recollection. In deciding the question of credibility, remember that you should use your common sense, good judgment and experience.

In this case, I have permitted certain witnesses on occasion to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts. In weighing this opinion testimony, you may consider the witness' qualifications, his or her opinions, the reasons for testifying as well as all the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight if any you find it deserves in light of all the evidence in the case. You should not however accept opinion testimony merely because I allowed the witness to testify concerning his opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

You have heard the testimony of a witness who was previously convicted of crimes punishable by more than one year in jail. The prior conviction was put into evidence for you to [304] consider in evaluating the witness' credibility. You may consider the fact that a witness who testified is a convicted felon in deciding how much of his testimony to accept and what weight if any it should be given.

You have heard evidence that a witness made a statement on an earlier occasion which counsel may argue is inconsistent with the witness' trial testimony. Evidence of the prior inconsistent statement was placed before you for the limited purpose of helping you decide whether to believe the trial testimony of the witness who contradicted himself. If you find that the witness made an earlier statement that conflicts with his trial testimony, you may consider the fact in deciding how much of his trial testimony if any to believe. In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake. Whether the inconsistency concerns an important fact or whether it had to do with a small detail, whether the witness had an explanation for the inconsistency and whether that explanation appealed to your common sense. It is exclusively your duty based upon all the evidence and your own good judgment to determine whether the prior statement was inconsistent and if so, how much of any weight is to be given to the inconsistent statement in determining whether to believe all or part of the witness testimony.

You have heard the testimony of a law enforcement [305] official. The fact that a witness may be employed by the federal government as a law enforcement offi-

cial or any local government for that matter does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness. At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be colored by a personal or professional interest in the outcome of the case. It is your decision after reviewing all the evidence whether to accept the testimony of a law enforcement witness and to give to that testimony whatever weight if any you find it deserves.

All right. Ladies and gentlemen, with these preliminary instructions in mind, we'll now turn to the charges against the defendant. At this point in time, you'll take a well-needed break. We'll take about a ten-minute recess and then I will continue reading the remaining balance of the instructions to you and then you'll be able to begin your deliberations. So you should not discuss anything yet at this point. We'll just take a ten-minute recess.

(Recess.)

THE COURT: You all may be seated. Ms. Moye advises me that lunch has arrived. So just bear with me as I continue reading these instructions because as I've said, these are very important and then you'll be able to begin your deliberations. [306] With these preliminary instructions which I've just given you before the break in mind, let us now turn to the charge against the defendant as contained in the indictment. I remind you that an indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against a defendant. Every crime consists of two principal parts, a criminal intent and a criminal act. Let me talk for a

moment about criminal intent. Generally, intent to do something means someone knows what he or she is doing and does it on purpose or willfully. For the crimes charged in this case, the Government must show beyond a reasonable doubt that with regard to the criminal acts charged, the defendant knowingly and intentionally sought to do the illegal acts charged. The defendant is not charged with committing any crime other than the offenses contained in the indictment. You have heard evidence of other acts allegedly committed by the defendant. When that evidence was introduced, I instructed you that it was to be considered by you solely for a limited purpose. I will explain that that limited purpose, that limited purpose again in a moment. But I want to emphasize to you now that you are not to consider that evidence for any other purpose and you are only to return a verdict as to the charges contained in the indictment.

The indictment consists of a total of two counts. Each count charges the defendant with a different crime. You must consider each count separately and return a separate verdict of [307] guilty or not guilty for each and you'll see that there's a verdict sheet that you'll be given. Whether you find the defendant guilty or not guilty as to one offense should not affect your verdict as to any other offense charged.

In order to sustain its burden of proof, the Government must prove that the defendant acted knowingly. A person acts knowingly if he acts intentionally and voluntarily and not because of ignorance, mistake, accident or carelessness. Whether the defendant acted knowingly may be proven by the defendant's conduct and by all of the facts and circumstances surrounding the case.

Knowledge, willfulness and intent involve the state of a person's mind. It has often been said to juries that the state of one's mind is a fact as much as the state of one's digestion. And I always hesitate to say that before lunch when I know you're getting hungry. But this is a fact that you are called upon to decide. Medical science has not yet devised an instrument which can record what was in one's mind in the distant past. Rarely is direct proof available to establish the state of one's mind. This may be inferred from what he says or does, his words, his actions and his conduct at the time of the occurrence of certain events. The intent with which an act is done is often more clearly and conclusively shown by the act itself or by a series of acts than by words or explanations of the act uttered long after its occurrence. Accordingly, knowledge, willfulness and [308] intent are usually established by surrounding facts and circumstances as of the time the acts in question occurred or the events took place and the reasonable inferences to be drawn from them.

The co-defendant is no longer on trial and you're not being asked to reach a verdict as to him. You are not to be concerned with the co-defendant, Mr. Couther, nor are you to speculate about the reasons why he is no longer a part of this trial. And this fact should not affect or influence your verdict with respect to the remaining defendant. You must base your verdict as to this defendant, Mr. Wright, solely on the basis of the evidence or lack of evidence against him.

The law does not require the prosecution to call as witnesses all who have been present at any time or place involved in the case or who may appear to have some knowledge of the matters in issue at this trial.

Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.

There are several persons whose names you have heard during the course of the trial, but who did not appear here to testify and one or more of the attorneys has referred to their absence in the trial. I instruct you that each party had an equal opportunity or lack of opportunity to call any of these witnesses. Therefore, you should not draw any inferences or reach any conclusions as to what they would have testified to had [309] they been called. Their absence should not affect your judgment in any way. You should, however, remember my instruction that the law does not impose on a defendant in a criminal case the burden or duty of calling any witness or witnesses or producing any evidence.

The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. By the same token, you do not have to accept the testimony of any witness who has not been contradicted or impeached if you find the witness not to be credible. You also have to decide which witnesses to believe and which facts are true. To do this, you must look at all the evidence, drawing upon your own common sense and personal experience. After examining all the evidence, you may decide that the party calling the most witnesses has not persuaded you because you do not believe it's witnesses or because you do believe the fewer witnesses called by the other side. In a moment I will discuss the criterior for evaluating credibility. For the moment, however, you should keep in mind that the burden of proof is always on

the Government and the defendant is not required to call any witnesses or offer any evidence since he is presumed to be innocent.

During the trial, you have heard testimony of witnesses and argument by counsel that the Government did not utilize [310] specific investigative techniques. For example, no fingerprints were taken and no transmitting device was utilized during the defendant's alleged conversations with the agents. You may consider these facts and in deciding whether the Government has met its burden of proof because as I told you, you should look to all the evidence or lack of evidence in deciding whether the defendant is guilty. However, you are also instructed that there is no legal requirement that the Government use any of these specific investigative techniques to prove its case. There is no requirement to attempt to take fingerprints or that it offer fingerprints or tape recordings in evidence. Law enforcement techniques are not your concern. Your concern as I have said is to determine whether or not on the evidence or lack of evidence, the defendant's guilt has been proved beyond a reasonable doubt.

The Government has been permitted to hand out a typed document which it prepared containing the Government's interpretation of what appears on the videotape recording which has been received as evidence and the tape recording itself is obviously in evidence and you'll have it in the jury room. With respect to those transcripts, they were given to you as an aid or guide to assist you in listening to the videotape. However, they are not in and of themselves evidence. Therefore, when the videotape was played, I advised you to listen very carefully to the videotape itself. You alone should make your own interpreta-

tion of what appears on the videotape based on what you [311] heard. If you think you heard something differently than appeared on the transcript, then what you heard is controlling. Let me say again, you, the jury, are the sole judges of the facts.

The Government has offered evidence tending to show that on a different occasion, the defendant engaged in conduct similar to the charges in the indictment. In that connection, let me remind you that the defendant is not on trial for committing this act, any act not alleged in the indictment. Accordingly, you may not consider this evidence of the similar act as a substitute for proof that the defendant committed the crime charged. Nor may you consider this evidence as proof that the defendant has a criminal personality or bad character. The evidence of the other similar act was admitted for a much more limited purpose and you may consider it only for that limited purpose. If you determine that the defendant committed the acts charged in the indictment and the similar act as well, then you may, but you need not draw an inference that in doing the acts charged in the indictment, the defendant acted knowingly and intentionally and not because of some mistake, accident or other reasons or other innocent reasons. Evidence of similar acts may not be considered by you for any other purpose. Specifically, you may not use this evidence to conclude that because the defendant committed the other acts, he must also have committed the acts charged in the indictment.

[312] You may not infer that the defendant is guilty of participating in criminal conduct merely from the fact that he was present at the time the crime was committed and had knowledge that it was being committed. You may not infer that the

defendant was guilty of participating in criminal conduct merely from the fact that he associated with other people who were guilty of wrongdoing.

There has been evidence introduced at the trial that the Government called as a witness a person who was using drugs when the events he observed took place or who was now using drugs. I instruct you that there is nothing improper about calling such a witness to testify about events within his personal knowledge. On the other hand, his testimony may be examined with greater scrutiny than the testimony of any other witness. The testimony of a witness who was using drugs at the time of the events he is testifying about or who was using drugs at the time of his testimony may be less believable because of the effect the drugs may have on his ability to perceive or relate the events in question. If you decide to accept his testimony after considering it in light of all the evidence in this case, then you may give it whatever weight if any you find it deserves.

There has been evidence introduced at trial that the Government used an informer in this case. I instruct you that there's nothing improper in the Government's use of informers and [313] indeed certain criminal conduct never would be detected without the use of informers. You, therefore, should not concern yourselves with how you personally feel about the use of informers because that is really beside the point. Put another way, your concern is to decide whether the Government has proved the guilt of the defendant beyond a reasonable doubt regardless of whether evidence was obtained by the use of an informer. On the other hand, where an informer testifies as he did here, his testimony must be examined with greater scrutiny than the testimony of

an ordinary witness. You should consider whether he received any benefits or promises from the Government which would motivate him to testify falsely against the defendant. For example, he may believe that he will only continue to receive these benefits if he produces evidence of criminal conduct. If you decide to accept his testimony after considering it in the light of all the evidence in this case, then you may give it whatever weight if any you find it deserves.

The indictment contains two counts. Count I charges the defendant with conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base. Count II charges the defendant with the possession of a controlled substance with intent to distribute on a particular date. I will not send the indictment back with you because I'm just going to summarize it here. It's summarized in Instruction 36 verbatim and I'll read it to you now, but you'll have it verbatim here in [314] Instruction Number 36. Count I. On or about September 14, 2004 in the District of Maryland, Dante Couther, James Wright, the defendants herein, did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other and others known and unknown to the grand jury to distribute and possess with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of cocaine base commonly called crack, a Schedule II controlled substance in violation of 21 United States Code, Sections 841(a)(1) and (b)(1)(a) and 21 United States Code, Section 846. Count II. On or about September 14, 2004 in the District of Maryland, Dante Couther, James Wright, the defendants herein, did knowingly, intentionally and unlawfully possess with intent to distribute 50 grams or more of a mixture of

a substance containing a detectible amount of cocaine base commonly called crack, a Schedule II and a controlled substance. 21 United States Code, Section 841(a)(1)and (b)(1)(a) of 18 United States Code, Section 2. The defendant has denied that he is guilty of these charges.

In this case, the defendant is accused of having been a member of a conspiracy to violate the drug laws of the United States. A conspiracy is a kind of criminal partnership, a combination or agreement of two or more persons to join together to accomplish some unlawful purpose. The crime of conspiracy to violate a federal law is an independent offense. It is separate and distinct from the actual violation of any specific federal [315] laws which the law refers to as substantive crimes. Indeed, you may find the defendant guilty of the crime of conspiracy to commit an offense against the United States even though the substantive crime which was the object of the conspiracy was not actually committed. Congress has deemed it appropriate to make a conspiracy standing alone a separate crime even if the conspiracy is not successful. This is because collective criminal activity poses a greater threat to the public safety and welfare than individual conduct and increases the likelihood of success of a particular criminal venture.

In order to satisfy its burden of proof, the Government must establish each of the following three essential elements beyond a reasonable doubt. First, that two or more persons entered into, two or more persons entered the unlawful agreement charged in the indictment starting on or about September 14, 2004. Second, that the defendant knowingly and willfully became a member of the conspiracy and third, that one of the members of the conspiracy knowingly

committed at least one act in Maryland in furtherance of some objective of the conspiracy.

The first element which the Government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered the unlawful agreement charged in the indictment. In order for the Government to satisfy this element, you need not find that the alleged members of the conspiracy met together and entered into any express or [316] formal agreement. Similarly, you need not find that the alleged conspirators stated in other words or writing what the scheme was, its object or purpose where every precise detail of the scheme or the means by which its object or purpose was to be accomplished. Indeed, it is sufficient for the Government to show that the conspirators tacitly came to a mutual understanding to accomplish an unlawful act by means of a joint plan or common design.

You may, of course, find that the existence of an agreement to disobey or disregard the law has been established by direct proof. However, since conspiracy is by its very nature characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the parties involved. In a very real sense then, in the context of conspiracy cases, actions often speak louder than words. In this regard, you may in determining whether an agreement existed here consider the actions and statements of all those you find to be participants as a proof, as proof that a common design existed on the part of the persons charged to act together for the accomplishment of an unlawful purpose. It is not sufficient that the unlawful agreement be between the defendant and a government agent. Some other per-

son must have entered into the unlawful agreement with the defendant in order for a conspiracy to exist. The second element which the Government must prove beyond a reasonable doubt to establish the offense of conspiracy [317] is that the defendant knowingly, willfully and unvoluntarily became a participant in or a member of the conspiracy. If you are satisfied that the conspiracy charged in the indictment existed, you must next ask yourselves who were the members of that conspiracy. In deciding whether the defendant was in fact a member of the conspiracy, you should consider whether based on all the evidence it appears that the defendant knowingly and willfully joined the conspiracy. Did he participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective as an associate or worker. In that regard, it has been said that in order for a defendant to be deemed a participant in a conspiracy, he must have had a stake in the venture or its outcome. You are instructed that while proof of a financial interest in the outcome of a scheme is not essential. If you find that a defendant had such an interest, that is a factor which you may properly consider in determining whether or not a defendant was a member of the conspiracy charged in the indictment. As I mentioned a moment ago, before a defendant can be found to have been a conspirator, you must find first that he knowingly joined in the unlawful agreement or plan. The key question, therefore, is whether a defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement. It is important for you to note that a defendant's participation in the conspiracy must be established by [318] independent evidence of his own acts or statements as well as those of the other

alleged co-conspirators and the reasonable inferences which may be drawn from them.

A defendant's knowledge is a matter of inference from the facts proved. In that connection, I instruct you that to become a member of the conspiracy, a defendant need not have known the identities of each and every other member nor need he have been apprised of all their activities. Moreover, a defendant need not have been fully informed as to all the details or the scope of the conspiracy in order to justify an inference of knowledge on his part. Furthermore, a defendant need not have joined in all of the conspiracy's unlawful objectives.

The extent of a defendant's participation has no bearing on the issue of his guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles while others play minor roles in the scheme. An equal role is not what the law requires. In fact even a single act may be sufficient to draw a defendant within the ambit of the conspiracy.

I want to caution you, however, that a defendant's mere presence at the scene of the alleged crime does not by itself make him a member of the conspiracy. Similarly, mere association with one or more members of the conspiracy does not automatically [319] make a defendant a member. A person may know or be friendly with a criminal without being a criminal himself. Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy. I also want to caution you that mere knowledge or acquies-

cence without participation in the unlawful plan is not sufficient. Moreover, the fact that the acts of a defendant without knowledge merely happened to further the purposes or objectives of the conspiracy does not make a defendant a member. More is required under the law. What is necessary is that a defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends. In sum, a defendant with an understanding of the unlawful character of the conspiracy must have intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking. He therefore becomes a knowing and willing participant in the unlawful agreement. That is to say a conspirator.

The third and final element which the Government must prove beyond a reasonable doubt is that one of the conspirators committed an act in furtherance of the conspiracy in Maryland. In order for the Government to satisfy this element, it must prove beyond a reasonable doubt that at least one act was knowingly and willfully done in Maryland by at least one [320] conspirator in furtherance of some object or purpose of the conspiracy. In this regard, you should bear in mind that the act standing alone may be an innocent lawful act. Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding or assisting the conspiratorial scheme. You are therefore instructed that the act does not have to be an act which in and of itself is criminal or constituted an objective of the conspiracy.

Just bear with me a little bit longer. If you find that the material involved in this case is cocaine

base, you must next determine the amount of cocaine base involved in the conspiracy. You will be asked to answer two questions with regard to both counts. One, whether this defendant is guilty or not guilty beyond a reasonable doubt of the counts charged in the indictment and two, if your answer is guilty as to this defendant to either of the counts charged, you will be asked if the amount of the cocaine base involved was 50 grams of cocaine base or more, less than 50 grams, but more than five grams or less than five grams of cocaine base. And this is Instruction Number 43 if you want to make reference to this. I will provide you with a special verdict form asking you to check the amount of cocaine base you find was involved. The burden remains on the Government to prove the amount of the cocaine base beyond a reasonable doubt. Remember, you should address the issue of the amount of cocaine base involved only if you are convinced beyond a [321] reasonable doubt that the defendant is guilty of either of the counts charged in the indictment. If you find the defendant is not guilty with respect to a particular charge, you do not have to address this question for that charge.

In order to prove, as to Count II, in order to prove this charge against the defendant, the Government must establish beyond a reasonable doubt each of the following three elements of the charge in Count II. First, that the defendant possessed narcotic drugs, namely cocaine base. Second, that the defendant knew that he possessed the cocaine base. And third, that the defendant intended to distribute the drug. I instruct you in connection with the second count of the indictment that cocaine base is a controlled substance.

As stated above, Count II charges possession with intent to distribute cocaine. As a result, definitions of

distribute and possession are in order and should be given to you. The word distribute means to deliver a narcotic. Deliver is defined as the actual, constructive or attempted transfer of a narcotic. Simply stated, the words distribute and deliver mean to pass on or to hand over to another or to cause to be passed on or handed over to another or to try to pass on or hand over to another narcotics. Distribution does not require a sale. Activities in furtherance of the ultimate sale such as the vouching for the quality of the drugs, negotiating for or receiving the price and supplying or delivering the drugs may [322] constitute distribution. In short, distribution requires a concrete involvement in the transfer of the drugs.

The legal concept of possession may differ from the every day usage of the term. So I will explain it in some detail. Actual possession is what most of us think of as possession. That is having physical custody or control of an object. For example, if you find that a defendant had the drugs on his or her possession or person, you may find that he or she had possession of the drugs. However, a person need not have actual, physical custody of an object in order to be in legal possession of it. If an individual has the ability to exercise substantial control over an object that he does not have in his physical custody, then he is in possession of that item. An example of this from everyday experience would be a person's possession of items he keeps in the safe deposit box at his bank. Although, the person does not have physical custody of those items, he exercises substantial control over them and so has what is known as constructive possession of them. Here is another example. Suppose A is negotiating the price of cocaine with B, standing next to A is C, who has several envelopes of cocaine in his pocket. After a period of negotiation, A directs

C to hand over to B a few of the envelopes. B then hands some money to A. In this situation, you could find that C had possession of the narcotics because he had them in his pocket. However, you could also find that A had possession of the narcotics because of his [323] proximity to the drugs, his association with the person, C, and actual possession of them and his negotiation over the price. This example is not conclusive, but is simply meant to illustrate the notion of constructive possession. Possession of the drugs cannot be found solely on the ground that a defendant was near or close to the drugs. Nor can it be found simply because a defendant was present at a scene where drugs were involved or solely because the defendant associated with a person who does control the drugs or the property where they are found. However, these factors may be considered by you in connection with all other evidence in making your decision of whether a defendant possessed the cocaine base.

The first element the Government must prove beyond a reasonable doubt is that the defendant possessed cocaine base. To establish this element, the Government must prove that the material that the defendant is charged with possessing or distributing is in fact cocaine base. The Government may prove this through either direct evidence or through circumstantial evidence. An example of direct evidence is the testimony of a chemist who has done a chemical analysis of the material. Circumstantial evidence would be evidence from which you could infer that the material was cocaine base such as testimony concerning the names used by the defendant to refer to the material or testimony about the material's appearance. Whether the Government relies on direct or circumstantial evidence to [324] prove that the

material in issue was cocaine base, it must do so beyond a reasonable doubt.

The second element the Government must prove beyond a reasonable doubt for Count II is that the defendant knew he possessed narcotics. To establish this element, the Government must prove that he possessed narcotics and that his possession was not due to carelessness, negligence or mistake. If you find that the defendant did not know he had narcotics in his possession or that he didn't know what he possessed was in fact narcotics, then you must find the defendant not guilty. Although the Government must prove that the defendant knew that he possessed narcotics, the Government does not have to prove that the defendant knew the exact nature of the drug in his possession. It is enough that the Government proves that the defendant knew that he possessed some kind of narcotics.

For this, I apologize, ladies and gentlemen. This is repetitive. And I do apologize because some of these are very repetitive. We're on Instruction Number 49. And we'll be finished in a minute and I've already said this. I'll say it again. Your decision whether a defendant knew the materials he possessed are distributed were narcotics involves a decision about the defendant's state of mind. It is obviously impossible to prove directly the operation of the defendant's mind. But a wise and intelligent consideration of all the facts and circumstances shown by the evidence and the exhibits in the case [325] may enable you to infer what a defendant's state of mind was. In our everyday affairs, we are continuously called upon to decide from the actions of others what their state of mind is. Experience has taught us that frequently actions speak louder and more clearly than spoken or

written words. Therefore, you may well rely in part on circumstantial evidence in determining a defendant's state of mind.

In Count II, the defendant is charged with not only the substantive offense charged in the count, but also with aiding and abetting the commission of that offense. The aiding and abetting statute, Section 2A of Title 18 of United States Code and you'll see it referenced in Count II provides that whoever commits an offense against the United States or aids or abets or counsels, commands or induces or procures its commission is punishable as a principal. Under the aiding and abetting statute that relates to Count II, it is not necessary for the Government to show that a defendant himself physically committed the crime with which he is charged in order for you to find the defendant guilty. A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself. Accordingly, you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the Government has proved that another person actually committed the offense with which the defendant is charged and that the defendant aided or abetted that person in the commission of the offense. As you [326] can see, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding and abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime. In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate himself in some way with the crime and that he will-

fully and knowingly seek by some act to help make the crime succeed. To establish that the defendant knowingly associated himself with the crime, the Government must establish that the defendant knew that Mr. Couther possessed crack cocaine with the intention to distribute it. To establish that the defendant, Wright, participated in the commission of the crime, the Government must prove that the defendant, Wright, engaged in some affirmative conduct for the specific purpose of bringing about that crime. Participation in a crime is willful if action is taken voluntarily and intentionally or in the case of a failure to act with the specific intent to fail to do something the law requires to be done. That is to say with a bad purpose either to disobey or to disregard the law. The mere presence of a defendant where a crime is being committed even coupled with knowledge by the defendant that a crime is being committed or the mere acquiescence by a defendant in the criminal conduct of others [327] even with guilty knowledge is not sufficient to establish aiding and abetting. An aider and abetter must have some interest in the criminal venture. To determine whether a defendant aided or abetted the commission of the crime with which he is charged ask yourself these questions. Did he participate in the crime charged as something he wished to bring about? Did he associate himself with the criminal venture knowingly and willfully? Did he seek by his actions to make the criminal venture succeed? If he did, then the defendant is an aider and abetter and therefore, guilty of the offense. If on the other hand, your answers to these series of questions are all no, then the defendant is not an aider and abetter and you must find him not guilty.

That concludes the instruction on the substantive offenses. The question of possible punishment of the

defendant is of no concern to you and should not in any sense enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon this Court. Your function is to weigh the evidence in the case and determine whether or not the defendant is guilty beyond a reasonable doubt solely upon the basis of such evidence. Under your oath as jurors, you cannot allow a consideration of the punishment which may be imposed upon the defendant if he is convicted to influence your verdict in any way or in any sense enter into your deliberations. The Government to prevail must prove the essential elements beyond a reasonable doubt. If the Government succeeds, your verdict should be [328]guilty. If the Government fails, it should be not guilty. To report a verdict, it must be unanimous Your function is to weigh the evidence in the case and to determine whether or not the defendant is guilty solely upon the basis of such evidence.

Each juror is entitled to his or her opinion. Each should however exchange views with his or her fellow jurors. That is the very purpose of jury deliberation. To discuss and consider the evidence, to listen to the arguments of fellow jurors, to present your individual views, to consult with one another and to reach an agreement based solely and wholly on the evidence if you can do so without violence to your own individual judgment. Each of you must decide the case for yourself after consideration with your fellow jurors of the evidence in the case. But you should not hesitate to change an opinion which after discussion with fellow jurors appears erroneous. Nevertheless, if after considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view that differs from the others, you are not to yield your convictions simply because you are outnumbered. Your

final vote must reflect your conscientious conviction as to how the issues should be decided. Your verdict, whether guilty or not guilty must be unanimous.

Upon retiring to the jury room, Juror Number 1 will be your foreperson. That is the person who will preside over your deliberations and who will be your spokesperson here in court. [329] The foreperson runs the meeting, controls deliberations and communicates with the Court. If it becomes necessary during deliberations to communicate with the Court, you may send a note by the marshal. No member of the jury should ever attempt to communicate with the Court by any means other than a signed and dated writing and the Court will never communicate with any member of the jury on any subject touching on the merits of the case otherwise than in writing or orally here in open court.

During the trial, several items were received in evidence and they will be sent back into the jury room with the exception of the actual narcotic drug.

That will not go back into the jury room when you deliberate. When you have reached unanimous agreement as to your verdict, please advise the Court by sending a note through the marshal that you have reached a verdict. Do not write the verdict down. When I receive that note, I will call the attorneys together and have you return with your verdict to the courtroom. You are never to reveal to any person, not even to the Court, how the jury stands numerically or otherwise on the question of the guilt or innocence of the defendant until you have reached a unanimous verdict. If any of you have bought a cell phone with you today, please give it to Ms. Moye, the deputy clerk of the court, to hold during your deliberations. The phone will be returned to you at the end of the

day before you're sent home. Now there will be a jury verdict form in this case and [330] that will go with you into the jury room and you will fill out the verdict sheet. And once you send a note out that you have a verdict, the foreman will hold onto the verdict sheet. Ms. Moye will then call and take attendance, determine if you've reached a verdict. Then she'll ask for the verdict sheet. She will come over to the foreman, retrieve the verdict sheet. She will show it to me for my review in terms of its form and then I'll return it back to Ms. Moye and she'll return it to the foreperson and then she'll call for the verdict and that will be the process. Counsel, if you'll approach the bench, please?

(Bench conference:)

THE COURT: Are there any other additional objections or exceptions other than that that you previously preserved on the record, Mr. Wallner?

MR. WALLNER: None from the Government, Your Honor.

THE COURT: Mr. Bourgeois?

MR. BOURGEOIS: I would just like to reiterate my earlier objections and my two proffered instructions for the reasons we discussed earlier, Your Honor.

THE COURT: And that's so preserved. Thank you.

MR. WALLNER: Your Honor, just as a matter of with the evidence, I noticed the other day where the tape is redacted because the volume, if the volume is such, they may be able to hear what has been redacted. I would just ask you to instruct them that when they reach the redacted section, that they fast [331] forward through that section.

THE COURT: Now how is it marked as redacted?

MR. BOURGEOIS: It's very apparent.

MR. WALLNER: It's very apparent. It's just snow.
THE COURT: All right. That's fine.

(In open court)

THE COURT: Ladies and gentlemen, one other matter. With respect to the tape, certain portions were lifted out of the tape that aren't of your concern. If you reach an area of the tape where it's all snow, just fast forward the tape up to the next point. Don't try to turn up the volume because it's of no concern to you and you can just fast forward through the snow. Is that a satisfactory instruction, counsel?

MR. WALLNER: Yes, Your Honor.

THE COURT: Mr. Bourgeois?

MR. BOURGEOIS: Yes, Your Honor.

THE COURT: All right. Okay. I'm now about to dismiss Alternate Jurors 1 and 2 and I want to thank you for your service. As I explained on money to the other members of the overall venire panel and as I will explain to this jury when it concludes deliberations, jury service is one of the highest callings we can ask of citizens in our country. It is the bedrock of democracy and we have had—as I mentioned Monday, we've had lawyers and judges from other countries come here and observe the process and I've often noted that some of our [332] greatest critics around the world still admire our jury system and as much as they may criticize us, they want to come and watch what happens because this is a very unique portion of American democracy. So I want to thank Alternate Juror Number 1 and Alternate Juror Number 2 for your service. You will now be excused. Ms. Moye will briefly make sure you get any personal

items. The local rules of court do not permit the lawyers to talk with you about your views of the case. You certainly can call the clerk's office at some point later after the verdict has been rendered to determine what the verdict was in the case and I want to personally thank both of you for your service. And I think, Ms. Moye, I have certificates of service to thank them and I've signed those and I thank both of you. So Alternate Number 1 and Alternate Number 2 are excused. Thank you very much.

(Pause.)

THE COURT: Ms. Moye, if you'll swear the bailiff, please?

(Bailiff sworn.)

THE COURT: Ladies and gentlemen, you are now excused to begin your deliberations and lunch is awaiting you.

(Jury was excused to commence their deliberations.)

THE COURT: Counsel, as long as you have provided Ms. Moye with your telephone numbers or cell numbers, you both can leave the courthouse and go ahead and have lunch. You're across the street, Mr. Wallner, obviously. Mr. Bourgeois, you're not [333] much farther away. So as long as you're within ten minutes of the courtroom. Certainly, you're aware of the conference room there on the third floor. You can utilize that. Obviously, the lawyers' lounge.

(Recess.)

THE COURT: Good afternoon. We have a note from the jury which I have marked as Court Exhibit 1. Have counsel been given copies of this yet, Karen?

THE CLERK: No, they haven't.

THE COURT: All right. I'll see that they get copies of it. Does Count 1 (conspiracy) have to be specifically between Wright and Couther or does it or is it between Wright and any other party but not Saffell? And that is the question from the jury and it specifically relates to—I can't tell. There's writing at the bottom that relates to page 1 of the instructions, Number 36 where we've laid out the indictment. The answer to the question, it clearly is a matter of law as set forth by the Fourth Circuit in *United States v. Lewis*, specifically that in Fourth Circuit opinion, a defendant may not be convicted for conspiring only with a government agent. And the jury I think has been so instructed in that regard and I'll instruct them again, being the answer to their question is is that the conspiracy has to be between Wright and Couther or between Wright and another party, but it cannot be Saffell, the government agent. Do you agree with that, Mr. Wallner?

MR. WALLNER: I do, Your Honor. But I'm not quite sure that's what the jury is asking.

THE COURT: Oh, I have no doubt that's what they're asking. It's very clear what they're asking.

MR. WALLNER: Okay.

THE COURT: Mr. Bourgeois?

MR. BOURGEOIS: Your Honor, I would request that you not instruct them as you propose, but simply reread them Court's Instruction Number 40 because I think you're offering, inadvertently offering some direction as to if they can convict him for Couther which obviously they can and I think

THE COURT: Or any other person.

MR. BOURGEOIS: Or any other person.

THE COURT: Isn't that a correct statement of the law?

MR. BOURGEOIS: I believe though that Court's Instruction Number 40 adequately states what the correct statement of the law is. That some other person must have entered into the unlawful act with the defendant and that the unlawful agreement cannot be between the defendant and a government agent. I think that covers that without being suggestive. It's from the commentary Sand, Section—

THE COURT: It's essentially saying the same thing, but that's fine. All right. I'll bring them in and just re-read Court's Instruction Number 40.

MR. BOURGEOIS: Thank you, Your Honor.

THE COURT: And, Mr. Wallner, it's clear what they're asking. They're just asking whether or not they can convict the defendant of conspiracy in connection with does it have to be specifically between Wright and Couther or is it between Wright and another party. And Court's Instruction 40 specifically addresses it. It says it's not sufficient that the unlawful agreement be between the defendant and the government agent. Some other person must have entered into the unlawful agreement with the defendant in order for a conspiracy to exist.

MR. WALLNER: I understand that. But I thought the jury's note suggested that—they already understood that it couldn't be Mr. Saffell, but they were asking if it could be the other unknown.

THE COURT: And that's what Court's Instruction Number 40 says.

MR. WALLNER: Very well, Your Honor.

THE COURT: It says some other person. So we'll bring the jury in and we'll answer that question and we'll see that you get copies of the note.

MR. BOURGEOIS: Thank you, Your Honor.

MR. WALLNER: Your Honor, can we approach while

THE COURT: Yeah. Certainly.

(Bench conference:)

MR. WALLNER: My concern is is if the jury is asking is whether or not the other person has to be Couther. That's the [336] way I was reading that note.

THE COURT: It clearly it doesn't say it has to be Couther.

MR. BOURGEOIS: It says some other person.

THE COURT: Your objection is noted on that and I'll certainly comment it doesn't have to be Couther. It's a matter of law. It's perfectly clear as a matter of law it doesn't have to be Couther.

MR. BOURGEOIS: Well, if you'll note my exception

THE COURT: It's not an exception. You want me to have them misapply the law. I believe it's clear the law is it doesn't have to be Couther.

MR. BOURGEOIS: Your Honor, I don't want you to misapply the law. I think Instruction 40 adequately states the law.

THE COURT: I'm going to explain it to them. It's clear it doesn't have to be Couther. Another third party.

MR. BOURGEOIS: Well, my exception will be noted.

THE COURT: All right. I understand.

MR. BOURGEOIS: Thank you.

(In open court:)

(Jury present.)

THE COURT: You all may be seated. I have your note here to the effect, does Count I (conspiracy) have to be specifically between Wright [337] and Couther or is it between Wright and any other party, not Saffell? That's the question and I'll refer you to Court's Instruction Number 40, page 47, which specifically says and you all can go over it again when you go back in the jury room, it specifically says it is not sufficient that the unlawful agreement be between the defendant and a government agent. But then the second sentence says some other person must have entered into the unlawful agreement with the defendant in order for a conspiracy to exist. It says some other person. It doesn't have to have been Mr. Couther. It has to be another person. It cannot be Mr. Saffell because as a matter of law, as a matter of law, a defendant may not be convicted for conspiring only with a government agent and that's what the second sentence says is some other person must have entered into the unlawful agreement with the defendant in order for a conspiracy to exist. So that is the Court's answer to that question. You may continue your deliberations. Thank you.

(Jury was excused to continue deliberations.)

THE COURT: Okay. Counsel, we'll just continue to await the jury.

(Recess.)

THE COURT: Counsel, it occurs to me it's about 17 minutes of 5. My sense is is that this jury will be awhile. That my sense is is that it would be helpful to the jury as well as the court personnel who have had

a very long day here today, essentially we've been pretty much going nonstop, that the jury [338] just be told at 5:00 that they will recess for the day and come back here tomorrow morning to continue their deliberations. Any problem from the point of view of the Government on that?

MR. WALLNER: No, Your Honor.

THE COURT: Defense?

MR. BOURGEOIS: No, Your Honor.

THE COURT: All right. That's what we'll do then. We'll wait until 5:00 and if they have not reached a verdict by 5:00, then I'll call them back in at 5:00 and excuse them for the day and we will have them come back again tomorrow at 9:30. So we'll stand in recess until 5:00.

(Recess.)

THE COURT: Counsel, we have a letter from the jury, a note from the jury which will be marked as Court Exhibit 2. We have a verdict.

MR. WALLNER: Thank you, Your Honor.

THE COURT: So we will call the jury in for the verdict.

(Jury present.)

THE COURT: Ladies and gentlemen, you may be seated. I have a note from you that you have reached a verdict. Ms. Moye, the deputy courtroom clerk, if you will take attendance of the jury and ask if they have reached their verdict, please?

THE CLERK: Taking a verdict in Criminal Number RDB-05-078, *United States of America v. James Wright*. Members of [339] the jury panel, as I call

your juror number, please acknowledge your presence. Juror Number 1?

A JUROR: Here.

THE CLERK: Juror Number 2?

A JUROR: Here.

THE CLERK: Juror Number 3?

A JUROR: Here.

THE CLERK: Juror Number 4?

A JUROR: Here.

THE CLERK: Juror Number 5?

A JUROR: Here.

THE CLERK: Juror Number 6?

A JUROR: Here.

THE CLERK: Juror Number 7?

A JUROR: Here.

THE CLERK: Juror Number 8?

A JUROR: Here.

THE CLERK: Juror Number 9?

A JUROR: Here.

THE CLERK: Juror Number 10?

A JUROR: Here.

THE CLERK: Juror Number 11?

A JUROR: Here.

THE CLERK: And Juror Number 12?

A JUROR: Here.

[340] THE CLERK: Members of the jury, have you agreed of your verdict?

THE JURY: We have.

THE CLERK: Who shall say for you?

THE COURT: The foreperson. Please stand, sir. Juror Number 1.

THE CLERK: Please rise. Has the verdict form which was submitted to the jury been answered, signed and dated by you?

THE FOREPERSON: Yes, it has.

THE CLERK: It is desired by the clerk to present to the Court.

(Pause.)

THE CLERK: Mr. Foreman, as I read the questions, please provide the answers. Count I, conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base commonly called crack cocaine.

THE FOREPERSON: Guilty.

THE CLERK: Count II, possession with intent to distribute 50 grams or more of cocaine base commonly called crack cocaine?

THE FOREPERSON: Guilty.

THE CLERK: Aiding and abetting the possession of cocaine base with the intent to distribute it?

THE FOREPERSON: Guilty.

THE CLERK: Now on the special verdict form. Count I. [341] The amount of cocaine base involved in the conspiracy was?

THE FOREPERSON: More than 50 grams of cocaine base.

THE CLERK: Count II. The amount of cocaine base possessed with the intent to distribute was?

THE FOREPERSON: More than 50 grams of cocaine base.

THE CLERK: Thank you.

THE COURT: The verdict has been so recorded. Does the Government or the defense counsel want the jury to be polled, Mr. Wallner?

MR. WALLNER: No, Your Honor.

THE COURT: Mr. Bourgeois?

MR. BOURGEOIS: Yes, Your Honor.

THE COURT: All right. Poll the jury, please.

THE CLERK: Juror Number 1, will you please rise? Having heard the verdict as read by the clerk and answered by you, is that your verdict?

A JUROR: Yes.

THE CLERK: Thank you. You may be seated. Juror Number 2, will you please rise? Having heard the verdict as read by the clerk and answered by your foreperson, is that your verdict also?

A JUROR: That is correct.

THE CLERK: Thank you. You may be seated. Juror Number 3, will you please rise? Having heard the verdict as read by the clerk and answered by your foreperson, is that your [342] verdict also?

A JUROR: Yes, it is.

THE CLERK: Thank you. You may be seated. Juror Number 4, would you please rise? Having heard the verdict as read by the clerk and answered by your foreperson, is that your verdict also?

A JUROR: Yes, it is.

THE CLERK: Thank you. You may be seated. Juror Number 5, will you please rise? Having heard the verdict as read by the clerk and answered by your foreperson, is that your verdict also?

A JUROR: Yes, it is.

THE CLERK: Thank you. You may seated. Juror Number 6, will you please rise? Having heard the verdict as read by the clerk and answered by your foreperson, is that your verdict also?

A JUROR: Yes, it is.

THE CLERK: Thank you. You may be seated. Juror Number 7, will you please rise? Having heard the verdict as read by the clerk and answered by your foreperson, is that your verdict also?

A JUROR: Yes, it is.

THE CLERK: Thank you. You may be seated. Juror Number 8, will you please rise? Having heard the verdict as read by the clerk and answered by your foreperson, is that your verdict also?

[343] A JUROR: Yes.

THE CLERK: Thank you. You may be seated. Juror Number 9, will you please rise? Having heard the verdict as read by the clerk and answered by your foreperson, is that your verdict also?

A JUROR: Yes, it is.

THE CLERK: Thank you. You may be seated. Juror Number 10, will you please rise? Having heard the verdict as read by the clerk and answered by your foreperson, is that your verdict also?

A JUROR: Yes.

THE CLERK: Thank you. You may be seated. Juror Number 11, will you please rise? Having heard the verdict as read by the clerk and answered by your foreperson, is that your verdict also?

A JUROR: Yes, it is.

THE CLERK: Thank you. You may be seated. And Juror Number 12, will you please rise? Having heard the verdict as read by the clerk and answered by your foreperson, is that your verdict also?

A JUROR: Yes.

THE CLERK: Thank you. You may be seated. Members of the jury, harken to your verdict as the court hath recorded it. The verdict sheet and answers thereto having been read, you and each of you have answered them as read by your foreperson and so [344] you say all?

THE JURY: Yes.

THE CLERK: Verdict recorded.

THE COURT: All right. Thank you. Ladies and gentlemen, I want to thank you for your service in this case. I will be coming back to speak with all of you in a moment. The local rules of court do not permit the lawyers to speak with jurors after a case. It's late in the day. I will give the lawyers the opportunity to call my chambers in the morning and I'll certainly have a conference call with both of them in terms of any feedback from the jurors. I want to thank you for your service. As you've heard me say now twice before that jury service is one of the highest callings we can ask of our citizens and it's the bedrock of our democracy and I want to thank you for the attention you've paid here in court over these last three days starting Monday of this week and the

attention you gave this case and thank you for your dedicated service. You may now retire to the jury room and we will then adjourn and I will come back in there in a minute and I have some certificates I want to give you and I want to thank you for your service and I won't hold you too long, but I'll talk to you and I'll be glad to talk with you. The jury will be excused to go back into the jury room and then I'll go into adjournment.

(Jury excused.)

THE COURT: This defendant has been in custody. Is that correct, Mr. Wallner?

MR. WALLNER: That is correct, Your Honor.

THE COURT: And he shall remain in custody under the factors under 18 United States Code, Section 3143 and I certainly can't make a finding by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of the community. So he will remain in custody and the marshals can return the defendant to the sixth floor and that having been done, then I will—hold on one second. I'm sorry. We can set the sentencing date now. It's late in the day here. The sentencing in this case will be Thursday, December the 1st at 2:00. On or before Monday, October the 24th, the probation officer who I believe will be Eileen Hall in this case shall serve two copies of the pre-sentence report upon counsel for the defendant, who shall review the report with and provide one of the copies to the defendant. On or before Monday, November the 7th, counsel shall submit in writing to the probation officer and opposing counsel any objections. After receiving objections, the probation officer will conduct any further investigation. On or before Friday, November the 18th, the probation officer shall serve two copies of any revisions to the

report upon the defendant. If counsel for either party desire to call any witnesses, you should notify the Court no later than Wednesday, November 23, 2005 and sentencing will be on Thursday, December the 1st and I'll sign this order today.

All right. Before we adjourn, why don't we have the I understand for security reasons from the marshals' point of view, they prefer to take the defendant to the lockup before I come down into the well of the courtroom to go over and talk to the jury. So we'll do that and we'll be adjourned in a minute just as the defendant departs.

Counsel, I want to thank you for a case well tried. I was glad that my clerks got to watch two good lawyers go at it in a very courteous manner and I appreciate the professionalism on the part of both of the lawyers in this case and it's late in the day. I'll talk to the jury and give them their certificates and certainly tomorrow morning sometime, I'll be glad to talk with you about any feedback from the jury. So we stand adjourned.

MR. WALLNER: Thank you, Your Honor.

(Proceedings concluded.)

I, LISA K. BANKINS, certify that the foregoing is a correct transcript, from the record of proceedings in the above-entitled matter.

/s/ Lisa K. Bankins 9-1-06
Signature of Court Reporter/ Transcriber Date

/s/ Lisa K. Bankins
Typed or Printed Name

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNDER SEAL

CRIMINAL NO. _____
(Conspiracy to Distribute and Possess with Intent to Distribute Cocaine Base, 21 U.S.C. § 846; Possession with Intent to Distribute Cocaine Base, 21 U.S.C. § 841(a)(1) and (b)(1))(A); Aiding and Abetting, 18 U.S.C. § 2)

UNITED STATES OF AMERICA

v.

DANTE COUTHER, JAMES WRIGHT,
Defendants

INDICTMENT

COUNT ONE

The Grand Jury for the District of Maryland charges that:

On or about September 14, 2004, in the District of Maryland,

DANTE COUTHER,
JAMES WRIGHT,

the defendants herein, did knowingly, wilfully and unlawfully combine, conspire, confederate and agree with each other and others known and unknown to the Grand Jury to distribute and possess with intent

to distribute fifty (50) grams or more of a mixture or substance containing a detectable amount of cocaine base, commonly called "crack," a schedule II controlled substance in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A).

21 U.S.C. § 846

COUNT TWO

The Grand Jury for the District of Maryland further charges that:

On or about September 14, 2004, in District of Maryland,

DANTE COUTHER,
JAMES WRIGHT,

the defendants herein, did knowingly, intentionally, and unlawfully possess with intent to distribute fifty (50) grams or more of a mixture or substance containing a detectable amount of cocaine base, commonly called "crack," a schedule II controlled substance.

21 U.S.C. § 841(a)(1) and (b) (1) (A) 18 U.S.C. § 2

_____
Allen F. Loucks
United States Attorney

A TRUE BILL:

_____
Foreperson
Date: _____

APPENDIX F

Transcription of CS purchase from
WRIGHT and COUTHER GC-04-0279

Transcribed by TFO Dwayne Crawley

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[1] CS: All right yo, I'm out front. Alright

CS: Hey, any of ya'll got a cigarette on you.

Unknown Male: Na.

CS: Oh alright. Hey I aint no bum or nothing. It's just I aint make it to the store yet. Alright.

CS: Hey yo, you better have some cigarettes on you to.

WRIGHT: You should have said that on the phone cuz.

CS: Yeah yo. What you want a couple of dollars or something yo. Here man. What you want?

WRIGHT: Come on man!

CS: Alright yo, don't play with me like that yo. Love you like a brother yo, treat you good.

WRIGHT: What's up? What you trying to do?

CS: I'm trying to get them two hard yo. (unintelligible)

WRIGHT: Trying to get two hard for what? (unintelligible) Ready?

CS: Yeah. Yo I borrowed my man shit yo. Yo his wife keep calling his phone. Na yo

WRIGHT: (Unintelligible) . . . I'm trying use your phone, see if I can get it done.

CS: (Unintelligible) Look yo, I got some hoochies want to go to the movies. You want to go? Later on?

WRIGHT: I want you to do me a favor yo. You want to do this now? (Unintelligible)

CS: Yo I need this to take care of my business yo. Yo I'm coming back for an 1/8th yo. (Unintelligible), Ford Explorer. Which way you, want to go?

WRIGHT: (Unintelligible)

CS: Na, the reason why I was trying to tell you that I might not have the whole two yo, I want I want you to make out with something too yo, you know what I mean? I got two thousand on me (unintelligible) I got twenty dollars that's all I can offer you. (unintelligible) That why I was saying, I don't know yo do what you want yo. I want two.

WRIGHT: Hold on, hold on, hold on.

CS: Alright. I aint got no sleep in the last few days. My girl wanna fuck, fuck, fuck.

WRIGHT: What's up boy?

KNOWN Male: Yo!

WRIGHT: What's up with ya? Nah my peoples live down there on Madiera and Patterson Park yo. Come holla . . . .

[2] UNKNOWN MALE: (Unintelligible) yo

WRIGHT: Shit, chilling getting ready go on this job interview shit. Driving truck.

UNK MALE: Oh alright alright.

WRIGHT: I'm a holla at you.

UNK MALE: (Unintelligible)

WRIGHT: Nah but I be in the house mostly, I be working in shit.

UNK MALE: Alright.

WRIGHT: Right there, it's only one house and Madiera's right there right. It's on this side the street.

UNK MALE: This side?

WRIGHT: Yeah. It aint no other house. It got white screen door, right there. The rest abandoned houses right there.

UNK MALE: Alright.

WRIGHT: Alright.

CS: (Unintelligible) Laughing. I'm saying you get charged for eighteen, keep the rest. That's why I said I might not have the whole thing cause I wanted to give you some. (Unintelligible) If you charge . . . . I got twenty dollars I can give you right now. You know what I mean, feel me. I want you to make out to yo. You always look out for me yo, I got you.

WRIGHT: Yo! Umn, Um, damn. I'm like at 1600 Madison right . . . . Yeah, um, how long you think it going to take you to get here . . . . How long you think it's going to take you to get here. Unless you want me to catch a hack up there . . . Yeah but I'm at 1600 Madison, you feel me . . . . I'll catch a hack up there though if you want me to . . . . . 1600 Madison

(WRIGHT laughing) Yeah I'm down the hill yo . . . . But you feel me though right? . . . . Alright so um, give you like what? . . . . . Na hit me, hit me in fifteen minutes . . . . Alright.

WRIGHT: He said fifteen minutes.

CS: So you gonna get a sweet price on that yo?

WRIGHT: Huh, yeah I'm a try to.

CS: I want you to look out for yo. Me I'm not pressed yo.

WRIGHT: Hey Yo! Can you do me a favor while we right here?

CS: What.

WRIGHT: Can you take me right there um, right there where the Burger King at on Erdman Avenue?

CS: Right now yo?

WRIGHT: It aint gonna take but a second yo. I'm a go in here and get this paper for the nigga (Unintelligible) we right here. It's going to take fifteen minutes and then we . . . (unintelligible)

CS: Yo this nigga yo . . .

[3] WRIGHT: But see once you get that shit, I know I'm here. Ya feel me.

CS: Na. You gone have money in your pocket. Catch a cab, hack down there yo. I'm giving you money out my pocket.

WRIGHT: (Unintelligible)

CS: (Unintelligible) We gotta burn time until he calls.

WRIGHT: Right, (Unintelligible)

CS: (Unintelligible) We got to go meet up with him.

WRIGHT: He gone meet us! (unintelligible)

CS: Oh, alright.

WRIGHT: Make this right . . . . Try to hit my man back, one more time.

Unintelligible . . . .

CS: I aint shave. I still look good though . . . . So what's up uh. You gone be. Yo said fifteen minutes. How long do it take after, I mean , is fifteen minutes included in him grabbing what you want? Huh!

WRIGHT: Go straight, I don't know. (unintelligible)

CS: I'm saying . . . .

WRIGHT: I, I get the money . . . .

CS: Is he gone look out for you for doing this?

WRIGHT: I'm a gonna work on it when I get to him, (unintelligible) He aint gonna say no.

CS: Nah, I'm saying. You gonna be able to hit for the whole O. I go the joint right here. I gotta though cause, I aint go lie everything aint my money yo.

WRIGHT: I got you. I got you.

CS: I'm not taking no shorts. Plus I'm looking out for you, so.

WRIGHT: See I was just going to try to give to my man, give him the whole two thousand cause he looks out for me. Plus I owe him a couple of dollars. So that a help me out on that I'm getting something. You know what I'm saying. Straighten my bill with him, I can always get something.

CS: You give him the whole two . . . .

WRIGHT: Right.

CS: Then I'm straight. I'm coming back yo. How much . . (unintelligible) how much an 1/8th gone cost?

WRIGHT: I can get you some soft probably nine a piece.

CS: How much a 1/8th gone cost me? A whole 1/8th hard! I'm talking about yo

WRIGHT: You say hard, you mean ready?

[4] CS: Yeah. That's what I need. That's what I need now, two ready.

WRIGHT: Oh, alright. Saying, I know you saying two ready Answer it though, cause it might be for me.

CS: Na yo. Long distance 912 . . .

WRIGHT: Just answer it though.

CS: Hello. Hello, oh nah, you got the wrong number. Yeah, you got the wrong number. Alright, bye. Got the creditors calling me yo.

WRIGHT: I'm just saying cause my man, he might be calling (unintelligible)

CS: Na, hold that. (unintelligible) I just need two hard as soon as possible yo, I got people waiting yo. See my people get to waiting and waiting and waiting . . . . . (unintelligible)

WRIGHT: I got one nigga said (unintelligible) I'm trying to do this cause this nigga helped me. I aint really pressed about no money yo.

CS: You can buy . . . you can pay four hundred a piece and keep the rest yo, yo I want two . . .

WRIGHT: Hold up hold up. Hey ma, hey look, look in your phone in that directory and give me that cell phone number it 's like 443 . . . . . Darnell number, I saved it momma . . . . . I just seen it on there 443 it's like 319 or 519 or something . . . . Right . . .

CS: Look this for you. This for you.

WRIGHT: Put that shit up yo. (unintelligible)

CS: Fuck no! (unintelligible)

WRIGHT: Yeah . . . . hello (unintelligible) . . . . Hello, this Daddio, I was just trying to hit you man. I got some thing urgent . . . . . Cant really rap to you, you know what I mean, I got to see you, I mean it got to be quick though huh . . . . you said hold on . . . . . nah yo . . . . . it's something beneficial but it got to be quick though . . . . . I'm down the hill.

CS: You got a cigarette on you.

WRIGHT: nab, (unintelligible) ten minutes

CS: (unintelligible) I try to be nice yo.

WRIGHT: (unintelligible)

CS: I show love to the wrong niggas yo. If I would have fucked with you the whole time, you would have been a millionaire. You know why, cause I would have been yo. I would have been a millionaire right with yo. I know you aint gone never fuck me, you aint never fuck me over. That's why I like fucking with you. Black be getting over. Black pinch out my bags and everything. (unintelligible) you know what I mean.

WRIGHT: I wanted to go with the hard cause I could have put a couple in my pocket.

CS: What hard what!

WRIGHT: You said you wanted the ready. I'm a just get yo to cook it up. It's gonna be butter though. You know what I'm saying. It's going to be good. The shit I can get.

[5] CS: Oh, he gotta cook it.

WRIGHT: Yeah, or I can get you the powder.

CS: Na, I want the hard yo, I'm having to much trouble yo, just go ahead and get the hard yo. Yeah. Whatever yo, if it's cheap, the rest is yours yo, I need a pack a cigarettes. (unintelligible) Is there a store anywhere around here (unintelligible) If you aint doing nothing, I got three girls trying to go to the motel tonight ye. Give me a ring back. Let me know . . You know one of them a mixed girl (unintelligible) . . . I got to pick them up.

WRIGHT: That's that's two though right?

CS: What. Two G's yeah. Na here you want to count it. Make sure it's all there. (unintelligible)

WRIGHT: (unintelligible) This nigga like everything alright right. That's why I fuck with him . . . (unintelligible)

CS: (unintelligible) I looked out for you when I aint have, you know what I mean. (unintelligible) 1/8th and we split it and we aint have no scale. (unintelligible) look at me now, I'm putting money in your pockets. It don't matter to me as long as you benefit from it yo. I know I am . . . . (unintelligible) that's why I care about you yo . . . (unintelligible) My girl sucked on my neck so hard yo. I hope it don't take this nigga a whole long time (unintelligible) I need a soda too yo (unintelligible).

WRIGHT: (unintelligible) Holla at yo. Get them at seven a piece. I owe him like six hundred. I'm a be like can give you that six hundred, you feel me. Bringing you a sale though, I know you be wanting a thousand

CS: And you squashing the bill . . .

WRIGHT: I know you be wanting a thousand a piece you feel me . . . (unintelligible)

CS: (unintelligible) Go at him like this. Yo this my man, yo this nigga got the county on lockdown. Yo we can come at you every two days. (unintelligible)

WRIGHT: (unintelligible) what he gone give me though.

CS: (unintelligible) whole 1/8th. He want a whole 1/8th. When we get a whole 1/8th we gonna get a whole quarter brick. When we get a whole quarter brick, we get a whole half . . . (unintelligible) I got it yo, I got the county on lockdown yo. The county belongs to me yo . . . It's mine, yo. I want you to be there with me. Yo they gonna put your shit back in there?

WRIGHT: (unintelligible) That aint fat.

CS: Na, that's fat right there. (Laughing) Hey, hey that's fat for real. (CS and WRIGHT laughing) Hey yo people love me yo, I'm just me. Nobody love me but me yo.

WRIGHT: (unintelligible) Hold that. Be like yo I got two right here.

CS: (unintelligible)

WRIGHT: Yo, yo I aint playing no games man. Come on get the fuck out of here. You think I'm gonna play some games yo . . . (unintelligible) for real you right though. I can go at that one nigga and get them bitches for seven a piece. That's what I'm going to stress to yo. Cause I owe him six. I'm gonna say look, I can go either way, either way you gonna benefit cause you gonna get the seven I owe you, I meant the six I owe you, you feel me.

CS: Yeah.

[6] WRIGHT: I'll make this move with yo, well do you want the two, what you gonna knock off what I owe you.

CS: (unintelligible) Especially when he knows you coming at him with two grand, tow big one at a time. Cause for real another thirteen hundred we can go get a whole 1/8th from somebody else, for real. So he better sell you or give you something. Better. (unintelligible) Do I turn right here?

WRIGHT: Yeah.

WRIGHT: Yo, yo, hello (unintelligible)

CS: Hey, grab me a soda and a cigarette yo.

WRIGHT: Get it over there

CS: Yo, let me hold that money til you get back.

WRIGHT: I'm getting ready (unintelligible)

CS: Oh he aint here!

WRIGHT: He right there . . . (unintelligible)

CS: Get my cigarette and soda first.

WRIGHT: Man you go ahead and get it, I'm going right there.

WRIGHT: What's up? We still got to wait yo.

CS: How long?

WRIGHT: Twenty minutes. Or we can just wait for this other nigga. Don't matter.

CS: How long is the other dude talking?

WRIGHT: Huh. Come on yo lets bounce. It don't look right just sitting here.

CS: How long is the other dude talking? My bad yo.

WRIGHT: The first nigga said fifteen minutes.

CS: Alright, where is he going to meet you at? Around the way?

WRIGHT: Yo said it's a lot of police around here. Yo aint really want to talk to me.

CS: Yeah yo.

WRIGHT: Yo aint even really wanna talk to me.

CS: (unintelligible) That's love. How many people would do that? Aint nobody do that yo. Nigga Black, I gave Black money to give to his kids . . .

WRIGHT: Where you going?

CS: I gave Black money to give to his kids cause he aint have no money to give his kids on their birthday yo. I gave him eighty dollars . . . (unintelligible) shit haven't been going right.

[7] WRIGHT: I got to call somebody

CS: (unintelligible) that white motherfucker talking a lot.

WRIGHT: Huh . . . yo . . he said his kids (unintelligible) Damn yo shook me up with that dumb ass shit.

CS: (unintelligible) Yo it's that time of the month. You need to come out there and hang with me a lil bit yo. Make this happen for me today, give my by tomorrow yo I'll bring you out there with me yo. I'll give you a chill spot. You come to the motel with me I'll hook you up with a girl. She got her own place, you can stay with her yo. Pack yo shit up.

WRIGHT: Hold up that nigga fell out a wheel chair yo. See him on the ground. (unintelligible)

CS: I'm glad I did meet you through a sour apple like Black. I wasn't going to deal with none of them for real. You say he's bad and I trust you yo I trust you with my life. I aint have no doubt, so I left him alone. He look like the type that he . . . (unintelligible) . . . yeah like with him you buying eights he want to keep sending you ounces for a G. You know what I mean.

WRIGHT: Right. Exactly.

CS: Then . . . (unintelligible)

WRIGHT: Then they gonna be stepped on.

CS: Yeah. Real heavy, I know. I'm with you that 's why I don't wanna fuck with him yo.

WRIGHT: He the type of motherfucker, he'll take get whatever he gone get and he be out there jamming. You be like yo le me buy some of that and it wont be the same.

WRIGHT: Where we going avow? You gone take me to the spot while we here?

CS: Where we got to go?

WRIGHT: It's on Erdman Avenue yo. Wherever he call me and tell me meet him at hat where we going to go at yo.

CS: That's what I hate about . . . (unintelligible) this and that. I want a nigga to have shit right there done. I'm saying every chance you take by driving you know. It's always a chance something can happen . . . (unintelligible)

Which way we going? What's up with your nigga's at the Barber shop?

WRIGHT: Shit shutdown.

CS: Na yo. The one where I met you at that day. Remember that nigga kept talking about my necklace and earrings and shit. I met you up there, the one on Erdman avenue . . . (unintelligible)

WRIGHT: (unintelligible)

CS: So they didn't really do anything to him . . . (unintelligible)

WRIGHT: They said some niggas started selling nickels and dimes out that bitch.

CS: That's where the heat come from yo.

WRIGHT: And it comes from selling vials too . . . . (unintelligible) It's a barbershop he be going up New York buying vials . . . .

[8] CS: He was selling vials out of there.

WRIGHT: He was selling them bitches for six dollars a box.

CS: Why aint you say something nigga I was going all they way up on fucking Moravia Park um, Moravia Road.

WRIGHT: (unintelligible)

CS: I don't give a fuck, it aint my truck (laughing)

(Unintelligible)

CS: Put hair on your chest nigga. Yo that girl love me she said I never had dick like this. She told her mother . . . (unintelligible)

WRIGHT: I had my girl for five years . . . . (unintelligible)

CS: (unintelligible)

WRIGHT: I'm not saying that, I know if I would have put that in we probably would have been broke up.

CS: (unintelligible)

WRIGHT: The same way you fucking bitches that been fucking all that loud talking about they never had it like that.

CS: She had tears coming down here eyes when she told me that yo . . . (unintelligible)

WRIGHT: Yo the bitch I'm fucking with now yo, I made this bitch come and she kept coming and coming . . .

CS: Multiples yo.

WRIGHT: Please stop . . . (unintelligible)

CS: Keep going.

WRIGHT: (unintelligible)

CS: (unintelligible)

WRIGHT: If I had a Escalade like that, I would be trying to get rid of it.

CS: What you doing now yo?

WRIGHT: I'm a go in here . . . (unintelligible)

WRIGHT: (unintelligible) . . aint shit.

CS: Yo people called you, what he say yo?

WRIGHT: He said he is on his way now . . . . (unintelligible)

CS: Take Erdman Avenue way or Lombard . . . . (unintelligible) Hey they want $54,000 for that truck . . . . (unintelligible) Guess how much the rims cost? $22,000. The real Sprewells

[9] WRIGHT: Real Sprewells on that?

CS: Na

WRIGHT: You gone put some on there.

CS: I'm putting the real ones on. Yo I got to get it moving.

WRIGHT: A nigga said it aint no such thing as Sprewells. He said Sprewell was just the first person to cop them . . . . (unintelligible) . . . I seen a dude . . . . (unintelligible) . . . I seen a dude that make them right. He invented them bitches. Sprewell and another dude were the first ones to have them. Every since them everyone been saying Sprewells.

CS: The spinners they suggest me to put on there which he showed me on the computer they cost eight grand, two grand a rim. And they 22's . . . . (unintelligible) I rather get a Expedition . . . . . (unintelligible)

WRIGHT: Yo could have told me that shit on the phone . . . . (unintelligible)

CS: Ah man I am so tired yo. I just want to fuck yo. I definitely go to get home yo. I got to give this nigga his truck back, he got to drop me off at my house. Maybe I can get my girl to meet me at his house . . . (unintelligible) . . . She aint to mad at all. She gave me a hug and kiss. Nah, Nah I think she had a clue but I don't think so cause she would have said something. I got a call coming in alright, alright bye. Hello, oh yeah um, I should be, how long should it be yo, I got people waiting yo.

WRIGHT: Twenty, twenty-five minutes yo.

CS: Twenty minutes exactly. Yeah. Huh, I know I aint waiting all day yo, I'm sorry I'll make up for it. I'll even make it bigger when I get em yo. Alright

baby . . . Three hundred sale right there yo, I aint got nothing.

WRIGHT: Yo straight yo, nigga on his way up there now . . . (unintelligible)

CS: Hit the middle button first let me show you. Hit it again on the call history, you hit it again and you come down is that it 236. Alright hit talk. We got to get you a phone to yo. We got to get you a phone. You want to stop up the market and get a phone yo.

WRIGHT: Fuck a phone.

CS: I'll get you a phone.

WRIGHT: I got a phone, I just got to put some minutes on it.

CS: Want me to get some minutes put on there for you? I'll put up like fifty dollars, I want you with me . . .

WRIGHT: Yo where you at cuz? . . . . . I'm on Erdman Avenue by the pump. You gonna be there when I get there right? Alright that's a bet.

CS: Hey yo, I want you to start hanging with me yo. I want to get you away from this city shit.

WRIGHT: I'm getting ready to start work. I feel you yo.

CS: Nah I don't want you around this yo. Well promise me this much, if you don't find a job and you get tempted to hustle yo I want you to call me and come with me yo.

WRIGHT: (Unintelligible)

CS: Nah, I have to yo . . . . (unintelligible)

[10] WRIGHT: (unintelligible)

CS: Check this out. Make this work with him. I'm coming back . . . . . (unintelligible) right down the middle with you show you how serious I am . . . Hello . . . yo I'm on a Mannesota and Erdman Avenue right now . . . . I got to get ready to drop my man off real quick then I'm a uh . . . she's over Dave's house matter of fact her mother keeps calling me they want me to help her with some shit. But they know I was tied up today. I go to take care of a couple things myself. As soon as I'm done I'm suppose to go back over there. She gonna pick me up to help. You know. Diane is staying over Kim house. Diane wants to get her most expensive stuff out of the house . . . . (unintelligible) . . . That's what I wanted to talk to you about. And if worst comes to worst, I'll put up the sixty dollars sixty-five for the storage. Nah I'm just saying though I'm trying to look out for her too though . . . (unintelligible) . . . baby's over at the house, Kim's over at the house . . . .(unintelligible) . . . Dave don't want Diane living there and moving all her shit in and all that . . . (unintelligible) . . . Til then she need some place to put her stuff so asshole don't try to fuck it up cause she don't want to be with him anymore. It's hard to drive and talk, can I call you back in a few minutes. Well take your phone with you . . . (unintelligible) . . . . . Nah yo, she mixed yo half white, half black . . . (unintelligible)

WRIGHT: Who number is this?

CS: That's yo people yo.

WRIGHT: Hello . . . . (unintelligible) . . . I hit redial.

CS: Cause you hit the button by mistake when you closed the phone. It does that to me all the time. Your mom even answered the phone one day when I did

that. Your mom knows me though. She hear my voice, she says he at his girls, I'm like alright I'll call over there . . . .(unintelligible) . . ey yo make sure that shit on the money too yo . . .

CS: Hey Tom, we right here on Harford Road and Gorsuch Avenue . . . . Right across from Lake Clifton

WRIGHT: Yo gonna ride with us. Go up this street . . (unintelligible) . . . . . and all that old shit.

CS: I'm gonna say it ain't too cool, right here.

CS: Where he gonna ride with us to?

WRIGHT: Probably his spot.

CS: Where's that at?

WRIGHT: Northern Parkway where we were at last time.

CS: Oh alright, I don't remember yo, you know how much weed I smoke yo. Where do I park at?

WRIGHT: He getting ready to drop the bike off yo. Just go ahead down there.

CS: Nah, it's two way yo . . . . (unintelligible) . . . . You know I'm getting a Ford Taurus . . . . . (unintelligible) Just scroll down , you'll see it yo.

WRIGHT: Make this right.

CS: Can I come over and smoke with you while you debate whether you gonna go with me or not to the motel yo.

WRIGHT: I'm not going yo. I'm loyal to my bitch right now.

[11] CS: Oh, alright I feel ya.

WRIGHT: When you weren't there for me shorty was giving me 150, 200 out her check. She get paid every two weeks in shit.

CS: The one I be calling, I mean . . .

WRIGHT: Yeah. Make this left.

CS: Long as she good to you that all that counts . . . . (Unintelligible) . . . Damn they tight as shit yo.

WRIGHT: Ho right here, right here, right here.

CS: Hold that yo. Yo my girl call don't answer it.

CS: What's up yo, Jeff yo!

COUTHER: "D"

CS: Hey, don't (laughing) . . I'm funny about my girl yo. Nah, I mean she think I'm out fucking around on her and shit

(Phone starts ringing)

CS: (unintelligible) . . . my bad yo, phone keeps ringing and its his wife

WRIGHT: On the two way. You see that shit . . . . (unintelligible)

CS: I miss my truck yo.

COUTHER: She go to work tomorrow.

CS: You miss my truck, yo.

COUTHER: She go to work tomorrow. (Unintelligible)

WRIGHT: I gotta ride back all the way with you and everything.

CS: Who me, that's me.

WRIGHT: And it's hot as shit out here.

CS: That's me. Aint nobody ever got knocked off with me and ever did no time with me yo. I sign paperwork yo that's all mine.

WRIGHT: I aint saying that. But I'm saying . . .

CS: (unintelligible)

WRIGHT: You gotta ride around with that shit cuz. I might catch a hack.

(LAUGHING)

CS: You want the money.

[12] WRIGHT: I already got it.

CS: Yeah, I love you like a brother yo.

WRIGHT: Yo, I don't really want you have to take down . . . (unintelligible) . . . . . they jumped out of a motherfucking Tahoe. They had a couple other little small cars and wont none of them police cars.

CS: (unintelligible) . . . . Hey I'm talking about from a one to a twelve yo, they thirteens, fourteens.

WRIGHT: Yo I got a good bitch on my side . . .

CS: So what. Get your dick wet in something else yo . . . . (unintelligible)

(LAUGHING)

CS: Hey yo can we cop a bag of smoke from up here?

WRIGHT: Man nah, we aint with . . . . .

CS: Alright I'll wait, I'll wait. I got smoke at home yo. You aint never been to my house either.

WRIGHT: You getting ready to get two onions and you trying to get a bag of weed on the way, that's crazy.

CS: Hey baby, how you doing? Hey what's going on baby? I'm on my way . . . ahh to pick my mother up, she got to pick her social service check up. I got to

take her up on Gay street by that juvenile detention center . . . . . Ha ha ha . . . I didn't have to Kim called me. I told Kim to tell you . . . (unintelligible) . . I'm a little tied up right now I got to take my mother down social support . . . Yeah, I got . . . .

COUTHER: Hey the truck driving school called Allstate?

WRIGHT: Yeah on Broening Highway.

COUTHER: It's on Broening Highway.

CS: Huh, what happened.

WRIGHT: Allstate career.

CS: Hey you know what, fuck that job you work at yo. I'm a put you in a two hundred dollar a week salary, fuck that.

WRIGHT: You want the number, I got the number right here.

COUTHER: Hold on yo.

CS: You don't need that! I give you two hundred soon as I get back if you don't screaming at me.

WRIGHT: I just thought about that shit.

CS: Stop screaming at me man! You suppose to love me, don't hurt my feelings like that.

WRIGHT: (Unintelligible) . . The number 631-1818.

COUTHER: 631 . . . 1818?

WRIGHT: Yeah 1818.

[13] CS: Don't get stressed out. Told you don't get stressed out. Let me handle this. I got you. You know. I'm paying for you driving school, phone bill whatever.

WRIGHT: Who that yo?

COUTHER: (unintelligible)

CS: I'm a take care of you man. Your daughter need shopping . . . . . You know what I mean. I'm a take care of you. Give me twenty minutes and I'm a call you right back. Give me twenty minutes . . . . . Yeah I'm a need somebody to pick me up at the same spot I got dropped off . . . . I'm a catch a cab, I need the address . . . . (unintelligible) . . . . . I call you back in twenty minutes when I'm on my way . . . . (unintelligible) . . . I love you.

WRIGHT: Why don't you get away from this truck yo!

CS: I cant yo, it's too close.

WRIGHT: (unintelligible)

COUTHER: (unintelligible)

CS: Yo, yo you want to hear something crazy. I bought, I bought twenty grams of raw dope right ad the shit came white it was white.

WRIGHT: (unintelligible)

CS: Nah yo, brown yo. I thought I got burnt. I was about to blow the niggas brains out yo. I thought I got burnt yo.

COUTHER: Crazy motherfucker yo.

WRIGHT: I seen that shit on tv one time.

(Unintelligible)

WRIGHT: (Unintelligible) . . It look like it was . . . .

CS: Hey yo I put a six on it yo . . . (unintelligible)

(Unintelligible)

WRIGHT: Niggas be banging though . . . . Niggas don't . . . . . they be banging, they gone sniff that shit. Nigga be getting high as a motherfucker off that little bit of shit. Cause you know they get a little bit anyway right . . . .

CS: My whole life revolves around drugs. Only thing I ever got to do . . . (unintelligible)

WRIGHT: So they figure they slam it they get it right in they bloodstream. Or up they nose, some gone get in they nose hairs and all that . . . .

CS: You ever had the doctor put an IV in you or to take blood. I passed out yo like a little bitch, I did yo.

WRIGHT: Yo you know why I was on the phone with you though . . . (unintelligible)

CS: Hey shorty you shouldn't be waiting by yourself! . . . . Hey yo I would have put her in here yo . . . . . You would have to get in the back. (CS laughing)

(Unintelligible)

[14] WRIGHT: Yo you know why I fuck with the bitch I fuck with though yo . . .

CS: Cause she gives you money yo . . .

WRIGHT: Not only that yo . . . .

COUTHER: (Laughing)

WRIGHT: (Unintelligible)

CS: (Unintelligible) . . . . That TLC shit.

WRIGHT: (Unintelligible) . . . I wasn't even trying to fuck her or nothing . . . (unintelligible)

COUTHER: (Unintelligible) . . . (Laughing)

(Unintelligible)

WRIGHT: You know I was fucking other bitches . . . (unintelligible)

CS: What that girl tell you when I put her on the phone with you yo? Alright. What that girl tell you when I put you on the phone with her yo? She said Jeff been hitting this pussy for four years.

WRIGHT: (Unintelligible)

CS: Hey you better watch it to yo, it's hot as shit around that bitch. I was mad as shit when you made me meet you around there yo. I'm lost just tell me where.

COUTHER: I'll tell you when.

CS: (Unintelligible) . . . . Yo let me make . . . . .

WRIGHT: (Unintelligible) . . . . I'm ready to get this work. I'm gone get my money together . . . . you know what I mean, get this money together . . . . once I get this money together it's game over.

COUTHER: Make this left.

CS: Get money together?

WRIGHT: I cant stand them niggas around the way no more! I cant hustle around them niggas yo. I be wanting to fight them niggas.

CS: I got a whole different hustle yo. My shit right here yo.

COUTHER: Pull behind this burgundy car.

CS: Alright. Here yo you need one of these yo?

COUTHER: Nah I'm good.

CS: Alright.

CS: Hey yo, I'm saying if I make a G tonight yo, I'm a pull the rest out the bank yo, we got to get a

1/8th of powder tomorrow yo. Can you set that up for tomorrow yo?

WRIGHT: No just just be cool yo. Everything . . . (unintelligible)

[15] CS: I'll chill then.

WRIGHT: You be doing a lot of talking over the phone yo.

CS: Here get on the phone yo.

WRIGHT: I aint got nobody to call. My bitch gone.

CS: Call your girl. Oh she aint got no job number.

WRIGHT: Yeah, but I don't know it by heart though. Call this other bitch, my home girl . . . . (unintelligible) (Unintelligible)

CS: That's the one you had call me talking about I'm a bail bondsman.

WRIGHT: Right.

CS: Yo you a dummy yo. You a dumb motherfucker yo.

WRIGHT: You got that hot ass scale with you. But you need it, I feel you.

CS: Nah it's clean though yo.

WRIGHT: Nah I meant hot.

CS: Nah I been burnt to much times.

WRIGHT: You aint got no where to stash that shit?

CS: Yeah. I'll throw that bitch in the back.

WRIGHT: Nah I mean everything.

CS: Nah I'm putting the shit on me.

WRIGHT: You got . . . (unintelligible) . . on?

CS: I got no, boxer briefs with the pockets.

WRIGHT: He what's up dude? . . . You was ducking me or something? . . . . . Cause I called you earlier and you aint return my call . . . . . but you still aint return my call . . . . .

CS: Yo just got finish shooting basketball.

WRIGHT: You sound sexy as shit today girl what's up with that? . . . . . Hello . . . . . Hey yo, I'm saying you need some money or something? . . . . . I want to do it to you . . . . . Yo I'm saying we can do this once a year or something, that's all . . . . . I can hear it in your voice . . . (unintelligible, laughing) . . . come on man look, check this out. Keisha, I know you yo you not just gone come out and turn me down, I'm a give you some ass. You gone play that role, we gone have to go out or whatever and then if I'm a get the ass, I'll get the ass. I know you better than that. You aint gonna say you gone give me the ass . . . . .

CS: She still . . (unintelligible) (Laughing)

WRIGHT: That's bad man. You gone miss, you don't want no multiples. I got multiples . . . . Hello . . . . Hello . . . I know how to do multiples now though . . . . . If I had you doing multiples back then, we probably be still together huh? . . . .

[16] CS: Let me say one thing yo. It's on your behalf.

WRIGHT: Oh now you got a boyfriend . . . . I thought you said you aint have no boyfriend? . . . . . That was since last week . . . . . But you told me you aint have no boyfriend though . . . . .

CS: I don't even know where we at yo! Were in the boondaux some motherfucking where!

WRIGHT: Oh alright then say that then. Don't day you got no damn boyfriend. You done broke my heart again. That's three times, that's three times now, that's three times . . . . . I thought you was holding out for me to come back so see if I was gone come back . . . .

CS: (singing)

WRIGHT: (Unintelligible) Hey every time you hear that damn Nelly song just think about me.

CS: Ah yo, dilemma.

WRIGHT: Alright that's all I ask alright, alright.

CS: Yo let me know if the rain get on your head yo. What's up man? She got a man?

WRIGHT: I don't give a fuck. I aint been fucking, I mean we aint been dealing with each other for like a whole year.

CS: Yo, yo keep that. I want you to call me later on yo. I want you to call me later on yo. I'll at least come by and smoke one with you before I go out to the mote. Cause I told my girl I'm going out with my peoples. Told her we one have a cookout. I don't know yo, maybe I should act like you and stand up the mote and just hang out with my girl yo. She does make me feel go yo. I aint never have a girl wake up for breakfast right there next to me yo. And she did that yo for the last four years straight. Nah I cook dinner though but she cook breakfast. Yo gas gauge broke cause that bitch been on E since he gave it to me . . . (unintelligible) . . Damn we done traveled eighty-two miles yo. Nah I aint even set that bitch . . . (unintelligible) . . Usually the trucks will last a long time.

WRIGHT: Should turn it off. You on E aint you?

CS: Nah the gas gauge broke. He even told me that I just forgot yo. It's broke.

WRIGHT: (unintelligible) . . . on E man you had me worried.

CS: Nah, it was just a little game to get you . . (unintelligible)

WRIGHT: Look at this bullshit for real. I was getting ready to say . . .

CS: What that?

WRIGHT: Yeah, I thought you needed it for the tank.

CS: Nah you need cigarettes, you might need something a sub . . . .

WRIGHT: Give my mother a couple of dollars.

CS: Nah, you give your mother a couple of dollars later on when I come back. Cause I give you some more money yo when I come back to smoke weed with you. I'll hit you off with like . . (unintelligible) . . dollars. Something to go out with you know . . . (unintelligible) . . . I'm more excited to see some strange motherfucker I just met yo than to beep at him. Yo done dipped in my bags.

[17] WRIGHT: Who Black?

CS: (Unintelligible) . . I'm saying that first time I dealt with you.

WRIGHT: You got the half from me.

CS: Yeah. I had the scale in the car remember. Alright. I gave him a hundred dollar bill right there yo. Remember Shallon, Nigga Shallon got jealous yeah and I sent him to the store and gave him twenty dollars and said get two packs of cigarettes. And I

gave Shallon a pack and I kept a pack and I told him to keep the change. And he felt disrespected cause I gave Black a hundred and I gave him the change from the twenty. How you gone do that yo, me and Black knew each other way before me and Shallon. Me and Black went to school together yo. Me and that nigga suppose to be sleeping in the same fucking bed for real when I am drunk. I mean, you know what I mean I be able to kick back I his joint while he out. And he treat me greasy yo. I fed his table yo. I put food on all them niggas tables yo. He tell you about that., how I had that dope jumping around there?

CS: Yo . . . . Hello . . . Yeah I'm on my way right now man, I got a little tied up I'm on my way now . . . . It shouldn't be that long , get your stem ready, I'll be right there though seriously . . . . Alright baby . . . (end of call)

WRIGHT: Talking about get your stem ready . . . .

CS: (Laughing)

WRIGHT: That's the stuff I be talking about man you be wide open . . .

CS: I be tripping man. Just joking yo. It's a joke inside thing.

WRIGHT: Right it's a inside thing but it's a outside thing for a motherfucker listening cause they know what a stem is.

CS: Nah a stem is a stem. A stem can be a straw for real.

WRIGHT: Nah, you know, you know the game . . . . (unintelligible) . . . that's why I be telling you yo don't do that.

WRIGHT: Cause I know this nigga aint gone pull up by where he doing it, for real. Probably walked four or five blocks.

CS: That's alright, it don't matter yo. Maybe I should turn this bitch off. You talking four or five blocks.

WRIGHT: You never know.

CS: Hell yeah.

WRIGHT: You aint going take, I mean that's my man. Shit he probably wouldn't trust me. I wouldn't trust him if I . . (unintelligible) . . that's my stash house. He going to get two onions in there, that make a nigga want to know which house it is. You know?

CS: Yeah. I fuck with you real heavy yo.

WRIGHT: I know.

CS: Yo you call me and tell me somebody did something to you yo, I'll handle that myself yo. I wouldn't even worry about trying to gather people up, I'll do that. I'll never see no harm done to you.

[18] WRIGHT: (unintelligible)

CS: Oh alright yo.

WRIGHT: Fuck is this nigga at? I don't like sitting like this.

CS: It's a nice area though. It's better than sitting on Harford Road. I'm saying can we go through him with powder for tomorrow too?

WRIGHT: (unintelligible) . . I'll rap to him.

CS: Get a price on that cause I go to know by tomorrow . . . (unintelligible) . . . . I'll come up with

thirty-five. Get it for thirty five yo I just got to make a G tonight . . . . (unintelligible) . . . . So I got to make a G tonight . . . (unintelligible) . . Now I got to take my girl with me and make hits and all that shit all night tonight. Cause she'll bitch if I don't, she'll swear I'm out fucking somebody. And I don't want that, so I'm a have to take her with me. Fuck I knew this shit was going to happen. Fucking shit, I got to western union my daughter mother some money yo.

WRIGHT: I was bout to say damn, I was hoping this was yo.

CS: That is him.

WRIGHT: I know at first I didn't know that was him.

CS: Man I'm like yo, I wanna smoke so bad yo. I'm a smoke a whole one til my face get numb.

CS: I was fucking with him, I told him we was on E but my man when he gave me the truck yo, he said, he said the gas gauge was broke. So I was just trying to get him to hurry up. He talking like he in love, wait til you see my girl.

WRIGHT: (Unintelligible)

CS: Wait til you see my girl yo, I took Viagra and fucked her for seven hours yo. Pussy locked up on me felt like a pit bull yo. Why it's so dark so fucking early yo? . . . . . Yeah that's straight, let me put that shit right here.

COUTHER: Make a right.

CS: A right?

COUTHER: Yeah.

CS: Boxer briefs saved me yo, trust me invest in them.

(Unintelligible)

CS: I'm a have thirty-five tomorrow yo . . . . (unintelligible)

WRIGHT: (Unintelligible) . . . that's my people though. So I feel like I gotta . .

CS: Which way?

COUTHER: Left.

WRIGHT: I feel like I got to be the bigger person cause I'm the oldest and I just walk away from that shit. And whatever happens to yo, that happens.

[19] CS: Your mother calmed down a lot yo since you hooked up with that girl yo . . (unintelligible) . . . his mother came downstairs one day yo . . . .

COUTHER: Oh I know how his mother is . . . (Laughing)

CS: She looked at me and said I know you up to no good. I mean she know I don't do drugs.

COUTHER: I know how his mother is.

CS: (Unintelligible) . . . the boy in the truck with the spinners . . . (unintelligible) (Unintelligible)

COUTHER: (Unintelligible) . . . hell yeah.

WRIGHT: I'm saying a nigga probably love play station but that would have been a hurting feeling. Playstation working against you cuz. (WRIGHT laughing) Damn

COUTHER: I know your mother like crushed. You know what I'm saying. Both her boys.

WRIGHT: Yeah. I thought . . (unintelligible) . . . know who I be seeing though I be talking to every now and then?

COUTHER: Who that?

WRIGHT: Skeeta.

COUTHER: Oh yeah . . . (unintelligible) Skeeta always do him cause it's only him. You feel what I'm saying.

WRIGHT: Yeah. He fuck with them . . . (unintelligible)

COUTHER: Yeah.

WRIGHT: Yo got a Lex and uhh he got the Lex coupe.

CS: Yo I got a connect up New York on the E's yo.

COUTHER: Nah he got s what's a name yo.

WRIGHT: What?

COUTHER: That's a 300. He got the new 300.

WRIGHT: Oh that's a Z.

COUTHER: Yeah.

(Unintelligible)

WRIGHT: (Unintelligible) . . . right there off the strip.

COUTHER: I know where you talking about.

WRIGHT: He be a street over and shit. Damn young.

CS: Why I got to have this truck. Why cant I have my truck.

[20] WRIGHT: (Talking to girl outside the vehicle) What's up young? How you doing?

CS: If I'd a have my truck yo . . . (unintelligible)

WRIGHT: Oh it's like that! You cant speak?

(LAUGHING)

CS: The one back here really want to holla at you. Yo you a fool yo.

WRIGHT: I'm just speaking. I cant speak?

COUTHER: Fuck her yo. Bet if you would have called her a bitch, she would have had all kinds of words for you.

WRIGHT: Right.

CS: I would a smacked her for you yo. That's how much I fuck with you yo. I would have smacked somebody for you.

WRIGHT: Alright so I'm gonna make the comment bitch and see how you get down.

CS: Yo, Yo you crazy. Nah

COUTHER: Nah she aint gonna call you no . . . (unintelligible)

WRIGHT: I'm talking about him. He talking about he gone smack something.

CS: Na, Na I wouldn't hit no girl.

WRIGHT: (Unintelligible) . . . she gone call me out my name.

CS: You call me about somebody else fucking with you yo, I'll them hot ones up in them. I should have kept that motherfucker yo . . . (unintelligible)

WRIGHT: The only reason why I am going to get my car back is because I owe on that bitch. Other than that . . (unintelligible)

CS: Hey your car is nice yo. But once . . (unintelligible) . . inside of you car you yo. Do away with it yo. Let it go. Even if it's cheap.

COUTHER: That's just like when they snatched old head truck one time . . . .

CS: You be finding shit up in there . . . (Laughing)

COUTHER: They aint take shit in his truck. He got rid of it. He got rid of it like five months later. You know what I'm saying.

CS: My man . .

COUTHER: He don't even drive it.

CS: My man owns a legitimate business.

COUTHER: Yo parked that motherfucker yo. You know what I'm saying. I aint even driving that motherfucker man. Fuck that truck.

[21] CS: Yo look at that. What you think about them yo, the Eddie Bauers?

WRIGHT: Hey yo what do you think LCD mean to the police?

CS: LCD?

WRIGHT: I was thinking it mean or LDC like a lot of detectives, some shit like that. Cause one time they had me down homicide and they was like . . . .

CS: Yo old school be talking about the police. Which way we going?

WRIGHT: Cause he wrote it on the paper and he showed it to the other nigga right. I was just looking like . . (unintelligible)..where your car at. You gone let us check your car? I was like go ahead the shit right around there.

CS: What's the initial?

WRIGHT: Like LCD.

COUTHER: Probably . . . .

WRIGHT: I don't know if it the lie detector, lie sensory detector or some shit.

CS: Nah that's illegal. They cant . . . (unintelligible) . . . Oh nah, my man worked at the body shop yo . . (unintelligible) . . . he had one of them tracking devices on them. I think he had a Expedition.

COUTHER: Lo Jack. Lo Jack.

CS: Na Na yo.

COUTHER: (Unintelligible)

CS: Yeah. It wasn't Lo Jack. I know them Lo Jack.

COUTHER: You know how hard it is to find them Lo Jacks on your car yo?

CS: They hide them good.

COUTHER: They hide the shit out them motherfuckers man!

CS: I might get the Onstar shit on my next truck. Where you can navigation and all that.

COUTHER: You cant even pull any frauds when them shits man. Know what I'm saying. You cant even pull a motherfucking insurance fraud with them bitches yo.

CS: Yo I got to go all the way up Joppa town to pick up that kind bud yo. (CS laughing) I got a lot of driving to do today yo.

WRIGHT: Yo I'm just going let you go. I'm getting out up here cause I aint trying to ride down the hill . . . (unintelligible)

CS: Yo, yo don't forget though call me when you get to your mom's house though. I'll stop down and smoke one with you real quick. Ride around and smoke.

COUTHER: Yeah . . . What's up? . . . . (unintelligible) . . . . . You said Tavon? . . . . (unintelligible)

[22] (Unintelligible)

WRIGHT: You know why she aint have nothing to say to me cause I was in the passenger side.

CS: Nab, you went wrong.

COUTHER: I like how you know they got that mentality.

CS: You went wrong yo, you went wrong yo.

WRIGHT: But she was looking hard as shit.

CS: You went wrong

COUTHER: (Unintelligible) . . You know what I'm saying.

WRIGHT: Then when I try to push up on her, she probably, she was shook.

COUTHER: That's like back in the day like when fat boy aint have no license. And they aint used to drive their cars.

WRIGHT: They used to have somebody else cars.

COUTHER: They be, They used to have someone else drive and they be in the front or the back. Especially when they use to have their truck they used to be in the back.

WRIGHT: This little bitch in the red right here . . .

CS: What, what that dude name? Oh yeah the green shirt, she bad. Yo what's that dude name, black dude yo?

(Unintelligible)

CS: (Unintelligible) He get a couple hundred dollars in his pocket.

CS: Got me hemmed up. He took the charge though. He had the shit on him.

WRIGHT: (Unintelligible)

CS: They locked everybody up til somebody claimed the possession . . . (Unintelligible)

COUTHER: Make this left. This one right here.

WRIGHT: It suppose to be a oil company somewhere on this lot.

CS: Yo is that who you was talking about when I was getting rid of my jewelry in shit.

WRIGHT: Yeah.

CS: Yeah yo, I got rid of $22,000 in jewelry yo. I just started getting rid of shit. I let it go but dude blessed me.

COUTHER: Right here.

CS: Yo call me later on yo. I'm gonna drop you some money and you gone smoke a B with me alright.

[23] WRIGHT: Alright.

CS: When you get down the way call me yo.

WRIGHT: (Unintelligible)..all my bullshit. Alright (Unintelligible)

CS: Little college motherfucker. (Laughing)

WRIGHT: Alright yo.

CS: Alright yo.

WRIGHT: Be safe nigga.

CS: Yeah.

U.S. Department of Justice
Drug Enforcement Administration

REPORT OF INVESTIGATION

1. Program Code [redacted]	2. Cross File / Related Files ☒ [redacted]	3. File No. [redacted]	4. G-DEP Identifier [redacted]
5. By: CRAWLEY, Dwayne T., TFO At: DEA HIDTA GROUP 51		6. File Title WRIGHT, James	
7 ☐ Closed ☐ Requested Action Completed ☐ Action Requested By:		8. Date Prepared 09-17-2004	

9. Other Officers: G/S Priscilla Lewis, S/A Troy Wilson, S/A John Flickinger, S/A Joseph Rosati, TFO Thomas Smith, TFO Byron Scott, TFO Matt Glassman,

10. Report Re: Arrest: The purchase of Exhibit 1 from WRIGHT, James and COUTHER, Dante and the acquisition of Exhibits N-1-N3 on September 14, 2004.

SYNOPSIS

On September 14, 2004, at approximately 2:50PM, CS-02-108157 met with James Wright in Baltimore City, Maryland. During this meeting, CS-02-108157 purchased approximately 2 ounces of crack cocaine from WRIGHT and COUTHER, Dante for $2,000.00 OAF.

DETAILS

1. On September 14, 2004, at approximately 2:50PM, CS-02-108157 hereafter referred to as CS, met TFO Thomas Smith and TFO Crawley. The CS made a controlled recorded call to WRIGHT and advised WRIGHT that the CS was ready to purchase the two (2) ounces of crack cocaine. WRIGHT told CS to meet him (WRIGHT) at 2226 E. Madison Street Baltimore, Maryland 21213.

2. At approximately 2:55PM TFO Crawley and TFO Thomas Smith searched the CS and found the CS free of any contraband. TFO Crawley gave the CS $2,000.00 serialized OAF to purchase the crack cocaine and a recording device (Exhibit N-2). TFO Crawley and TFO Smith followed the CS to WRIGHT's residence while surveillance was already in the area.

3. At approximately 3:15PM, the CS arrived at 2226 E. Madison Street where WRIGHT was waiting. S/A Flickinger observed WRIGHT entered the front passenger side of the vehicle and the CS drove away.

11. Distribution: Division WASHINGTON FIELD DIVIS District Other	12. Signature (Agent) Dwayne T. Crawley DRAFT	13. Date 09-17-2004
	14. Approved (Name and Title) Priscilla E Lewis, GS	15. Date 09-17-2004

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(Jul. 1995)

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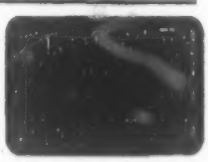

BEST AVAILABLE COPY

U.S. Department of Justice
Drug Enforcement Administration

REPORT OF INVESTIGATION (Continuation)	1. File No. [redacted]	2. G-DEP Identifier [redacted]
	3. File Title WRIGHT, James	
4. Page 2 of 4		
5. Program Code [redacted]	6. Date Prepared 09-17-2004	

4. At approximately 3:25PM, the CS and WRIGHT arrived at the BA BA JANI convenience store located at Harford Road and Hillen Road in Baltimore City, Maryland. TFO Crawley observed WRIGHT exited the vehicle and walked around the immediate area.

5. At approximately 3:40PM, TFO Crawley observed WRIGHT returned to the vehicle and get inside. The CS drove away from the location with surveillance following the vehicle.

6. At approximately 4:00PM, TFO Glassman observed the vehicle stop in the 1500 block of Abbotston Street, in Baltimore City. TFO Glassman observed a black male wearing a white T-shirt and gray shorts, later identified as Dante COUTHER, enter the rear passenger side of the vehicle. The CS left the location with surveillance following the vehicle.

7. On September 14, 2004, at approximately 4:21PM the vehicle stopped near the intersection of the 7800 block of Hillsway Road and the 1200 block of Dalton Road in Baltimore County, Maryland. The CS handed the $2,000.00 serialized OAF to COUTHER. S/A Wilson observed COUTHER exit the vehicle and walk into the alley that led to the 1300 block of Hillway court.

8. At approximately 4:35PM, S/A Flickinger observed COUTHER walking from the alley back to the vehicle. COUTHER was wearing a black jacket along with his original description. COUTHER entered the vehicle and handed a plastic bag containing rock like substance, suspected crack cocaine to WRIGHT. In turn, WRIGHT handed the suspected crack cocaine to the CS.

9. At approximately 4:45PM, the vehicle left the location and drove to the intersection of Alameda and Kirk Avenue. S/A Wilson observed WRIGHT and COUTHER exit the vehicle. The CS drove away from the location. TFO Smith and TFO Scott followed the CS to the pre-determined meet location. The CS handed TFO Smith a plastic bag containing rock like substance, suspected crack cocaine. A search was conducted of the CS and the CS did not have any contraband on his person.

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REPORT OF INVESTIGATION *(Continuation)*	1. File No. [redacted]	2. G-DEP Identifier [redacted]
	3. File Title WRIGHT, James	
4. Page 3 of 4		
5. Program Code [redacted]	6. Date Prepared 09-17-2004	

10. At approximately 4:50PM, the surveillance team approached WRIGHT and COUTHER and identified themselves as law enforcement officers. WRIGHT and COUTHER was taken into custody and transported to the Baltimore District Office for debriefing.

CUSTODY OF EVIDENCE

1. Exhibit #1 approximately 56 grams of crack cocaine was purchased by CS 02-108157 on September 14, 2004 from James WRIGHT and Dante COUTHER in Baltimore County, Maryland. TFO Smith transferred custody of Exhibit 1 to TFO Crawley. TFO Crawley maintained complete care, control and custody of Exhibit #1, until G/S Priscilla Lewis, witnessed by TFO Crawley, submitted it to the DEA Mid Atlantic Regional Lab for analysis and safekeeping.

NON-DRUG EVIDENCE

1. Exhibit N-1 are two cellular phones retrieved from COUTHER. TFO Crawley maintained complete care, control and custody of Exhibit N-1 until TFO Crawley processed, as witnessed by TFO Smith, and transferred custody of Exhibit N-1 to the Baltimore District Office Non-Drug Evidence Custodian for safekeeping.

2. Exhibit N-2 are three (3) original cassette tapes which contain recorded conversations of the CS, WRIGHT, and COUTHER on September 14, 2004. TFO Crawley maintained complete care, control and custody of Exhibit N-2 processed, as witnessed by TFO Smith, and transferred custody of Exhibit N-2 to the Baltimore District Office Non-Drug Evidence Custodian for safekeeping.

3. Exhibit N-3 is original videotape which contains recorded conversations of the CS, WRIGHT, and COUTHER on September 14, 2004. TFO Crawley maintained complete care, control and custody of Exhibit N-3 processed, as witnessed by TFO Smith, and transferred custody of Exhibit N-3 to the Baltimore District Office Non-Drug Evidence Custodian for safekeeping.

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REPORT OF INVESTIGATION *(Continuation)*	1. File No. [redacted]	2. G-DEP Identifier [redacted]
	3. File Title WRIGHT, James	
4. Page 4 of 4		
5. Program Code [redacted]	6. Date Prepared 09-17-2004	

INDEXING

1. [redacted]

2. [redacted]

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REPORT OF INVESTIGATION

1. Program Code	2. Cross Related Files	3. File No.	4. G-DEP Identifier
HID-100	☒ CS-02-108157	GC-04-0279	WGC3L
5. By: CRAWLEY, Dwayne T., TFO At: DEA HIDTA GROUP 51		6. File Title WRIGHT, James	
7. ☐ Closed ☐ Requested Action Completed ☐ Action Requested By:		8. Date Prepared 09-23-2004	

9. Other Officers: G/S Priscilla Lewis, S/A Troy Wilson, S/A John Flickinger, S/A Joseph Rosati, TFO Matt Glassman, TFO Byron Scott, TFO Thomas Smith

10. Report Re: Buy: The below listed OFG was utilized to purchase Exhibit #1 on 09/14/04.

The below listed OFG was utilized to purchase Exhibit #1 on 09/14/04.

Denomination	Serial Number	Series
Fifty Dollar Bill	FC19997176A	2001
Fifty Dollar Bill	AB74725526E	1996
Fifty Dollar Bill	AB37842769A	1998
Fifty Dollar Bill	AB98580870E	1996
Fifty Dollar Bill	CF21698189A	2001
Fifty Dollar Bill	AI16831595A	1998
Fifty Dollar Bill	CG06137047A	2001
Fifty Dollar Bill	AE8190318A	2001
Fifty Dollar Bill	AG29753808C	1998
Fifty Dollar Bill	AB002201950D	1998
Fifty Dollar Bill	AG06630233C	1996
Fifty Dollar Bill	CB02846956A	2001
Fifty Dollar Bill	AF65178739A	1996
Fifty Dollar Bill	AE64747391A	1998
Fifty Dollar Bill	AB52929770E	1996
Fifty Dollar Bill	CB36633889A	2001
Fifty Dollar Bill	AG11000107A	1996
Fifty Dollar Bill	AK88291696A	1996
Fifty Dollar Bill	AD98447458A	1998
Fifty Dollar Bill	AB44814497E	1996
Fifty Dollar Bill	AE74780175A	1998
Fifty Dollar Bill	AK48538995A	1996
Fifty Dollar Bill	AB28385720D	1996

DEFENDANT'S EXHIBIT NO. 4
CASE NO. RDB-05-078
IDENTIFICATION: 9-13-05
ADMITTED: 9-13-05

11. Distribution:	12. Signature (Agent)	13. Date
Division WASHINGTON FIELD DIVIS	Dwayne T. Crawley	09-23-2004
District BALTIMORE	14. Approved (Name and Title) Priscilla E. Lewis, GS	15. Date 9/27/04
Other		

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(Oct. 1999)

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5:33:n

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REPORT OF INVESTIGATION (Continuation)	1. File No. GC-04-0279	2. G-DEP Identifier WGC3L
	3. File Title WRIGHT, James	
4. Page 2 of 2		
5. Program Code HID-100	6. Date Prepared 09-23-2004	

Fifty Dollar Bill	AB98875491A	1996
Fifty Dollar Bill	AE05101496B	1996
Fifty Dollar Bill	AL00222858*	1996
Fifty Dollar Bill	AG51038767B	1996
Fifty Dollar Bill	AK52568627A	1996
Fifty Dollar Bill	AB73078731A	1996
Fifty Dollar Bill	AL2468917CB	1996
Fifty Dollar Bill	AL42456515B	1998
Fifty Dollar Bill	AB18348120B	1996
Fifty Dollar Bill	CB35683333A	2001
Fifty Dollar Bill	AL18634772B	1996
Fifty Dollar Bill	AF70991232A	1996
Fifty Dollar Bill	AG09293298C	1996
Fifty Dollar Bill	CG16910731A	2001
Fifty Dollar Bill	CL13157684A	2001
Fifty Dollar Bill	AB42936784E	2001
Fifty Dollar Bill	AB8957707CA	2001

FOURTY Fifty Dollar Bills = $2,000.00

TOTAL FOR PURCHASE OF EXHIBIT #1 IS $2,200.00

Witnessed by:

10/1/04

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APPENDIX H

DEFENDANT'S EXHIBIT NO. 5

CASE NO. RDB-05-078

IDENTIFICATION: 9-14-05

ADMITTED: _____

Defendant's Proposed Ju

(Based on *U.S. v. Wise*, 221

There has been evidence in this case that the Government has lost certain evidence. You may draw an inference that the evidence that the Government lost was adverse to the Government's case. If is, however, for you to decide whether such an inference should be drawn.